86-637

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Appellants,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: April 8, 1986. Decided: September 12, 1986

Before WINTER, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN and WILKINSON, Circuit Judges, sitting en banc.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/cross-appellees; Edwin Vieira (Joseph J. Hahn, National Right to Work Legal Defense Foundation, Inc., on brief) for Appellees/cross-appellants.

PER CURIAM:

In this cause, the existence of federal jurisdiction constituted the dividing issue both between the majority and dissenting panel opinions, as reported in 776 F.2d 1187 (4th Cir. 1985), as well as in the en banc hearing. Without reviewing the extended discussion of this issue in the two panel opinions, which delineated adequately the difference in the Court on the dispositive issue of jurisdiction, it seems sufficient for purposes of this en banc decision to summarize the ultimate jurisdictional decision as stated in the two panel opinions, beginning first with the majority opinion.

The majority panel opinion found first that the exaction of union dues from non-consenting non-union employees under an agency contract beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration was "a clear breach of section 8(a)(3) [of the NLRA] and of the union's duty of fair representation." It then concluded that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337." 776 F.2d at 1204-05 [1]

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[1] The majority opinion, in note 26 on page 1204, also opined that federal jurisdiction might also be found "under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185."

The majority opinion opined that, having found federal jurisdiction for violation of both the statute and the duty of fair representation, it seemed "unnecessary . . . to consider the constitutional basis for jurisdiction" *id.*, but despite this, it proceeded to state that on constitutional grounds jurisdiction in the cause was sustainable even though it had earlier recognized that decisions on constitutional grounds should be avoided if the matter could be resolved on statutory grounds. *See* 776 F.2d at 1198 and *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

The dissenting panel opinion, on the other hand, concluded that § 8(a)(3) of the NLRA "cannot fairly be read to impose" on unions under an agency shop agreement the obligation to use agency shop fees only "for purposes . . . directly related to collective bargaining, grievance adjustment, or contract administration" as against objecting non-union employees. 776 F.2d at 1214. As the dissent puts its position, "[b]oth the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA. Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3)." 776 F.2d at 1215. Nor, the opinion continues, can such exaction by the union of these dues to be used for purposes not related to "collective bargaining, grievance adjustment or contract administration" represent a cognizable constitutional claim because the union's "use of [such non-consenting employees'] fees does not constitute state action." 776 F.2d at 1214. The dissenting opinion did not discuss the maintainability of the action as one for a violation of the duty of fair representation by the union under § 1337.

After the filing of the panel opinions, en banc hearing of the cause was voted. At the en banc hearing, the arguments of the parties focused on the existence of federal jurisdiction of the cause. The arguments of the parties on such issues followed substantially the line of the two panel opinions already summarized, with the plaintiffs relying on the jurisdictional grounds adumbrated in the panel majority opinion and with the union and its local resting their argument on the grounds stated in the dissenting opinion.

After the en banc arguments, five members of the Court (Judges Russell, Widener, Ervin, Chapman, and Wilkinson), voted that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337," but three of these five judges (Judge Widener, Ervin, and Wilkinson) felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds. Judges Russell and Chapman, the other members of the group, however, were of the opinion that jurisdiction of the cause could also be sustained on the constitutional claim. Judge Murnaghan, speaking for himself, in a separate concurring opinion, filed along with this order and opinion, found that federal jurisdicion existed in this case to decide the plaintiffs' claims as violations of the union's statutory duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967),[2] but he agreed with the dissenting panel opinion insofar as it would deny federal jurisdiction on either the statutory or the constitutional grounds. The result is that six Judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds.

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[2] It is inaccurate to state that the majority opinion did not find jurisdiction on the violation of the duty of fair representation by the union. The majority panel opinion did assert such jurisdiction but it did not assert it with the same depth of reasoning and perception as does Judge Murnaghan's concurring opinion.

Four members of the Court have, however, voted after the en banc hearing, (Judges Winter, Hall, Phillips, and Sprouse) to sustain the conclusions of the dissenting panel opinion that here was no federal jurisdicion herein either on statutory or constitutional grounds. The dissenting opinion did not specifically address the violation of the duty of fair representation, as alleged in the plaintiffs' complaint and as found in both the majority panel opinion and in the concurring opinion of Judge Murnaghan to be a basis for jurisdiction herein, but it is to be assumed that this ground was similarly disapproved in the dissenting opinion.

It follows that the en banc court by a vote of six to four sustained federal jurisdiction in this cause. There was apparently no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved.

Accordingly, the result of the en banc consideration is the affirmation by the en banc court of federal jurisdiction over the cause and of the majority panel's determination on the allocation issue.

MURNAGHAN, Circuit Judge, concurring:

The posture of the case, the order of my writing and the outcome are, if not unique, at least unusual. A two-to-one majority at the panel level held unconstitutional a labor union's practice of using agency fees, received from employees who were not union members, for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Alternatively, the majority concluded that the union's conduct had violated § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). The non-member employees were entitled to relief for that violation, in the majority's view,

on two theories: first, that § 8(a)(3) itself provided them with a cause of action justiciable in the federal courts, and, second, that the definition of an unfair labor practice contained in § 8(a)(3) also described a breach of the duty of fair representation.[3] Judge Russell authored the majority opinion, with Judge Chapman concurring. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985).

Chief Judge Winter, in dissent, concluded that the absence of government action foreclosed the constitutional route to recovery, and that § 8(a)(3), involving only controversies between employers and employees, created no restriction on a union's authority to use agency fees for non-collective-bargaining purposes. He further concluded that, in the absence of a violation of § 8(a)(3), there could be no breach of the duty of fair representation, and that, in any event, the plaintiffs had no cause of action based on § 8(a)(3) itself, due to the National Labor Relations Board's exclusive jurisdiction to deal

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[3] The extent to which the panel majority relied on the duty of fair representation is unclear. On the one hand, the opinion states that "plaintiffs have stated a good cause of action for a violation of . . . the duty of fair representation" as well as for a violation of § 8(a)(3). 776 F.2d 1187, 1196. Moreover, the majority plainly concluded that it was the fair representation claim that brought the statutory aspect of the case within this court's jurisdiction, rather than within the exclusive jurisdiction of the NLRB. *Id.* at 1203-04. On the other hand, the majority's rationale for its holding on the statutory issue is explained exclusively in terms of § 8(a)(3) and its relationship to § 2, Eleventh of the Railway Labor Act, with no consideration given to the independent force of the duty of fair representation. In addition, the opinion states that "[o]nly if jurisdiction of these claims *under § 8(a)(3) itself* is non-existent would a dismissal of this action . . . be appropriate." *Id.* at 1196 (emphasis supplied). These somewhat contradictory indications are reconciled, it seems to me, if the opinion is read to hold that a breach of the duty of fair representation follows automatically from a violation of § 8(a)(3). If I have misread Judge Russell, I solicit his indulgence.

with unfair labor practices under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Id.* at 1214-25.

A grant of rehearing *en banc*, of course, eliminated the panel level decisions as grounds for disposing of the case. Back at square one, the court divided six to four. Judge Widener, Judge Ervin and Judge Wilkinson joined Judge Russell and Judge Chapman on one side of the great divide, while Judge Hall, Judge Phillips and Judge Sprouse aligned themselves with Judge Winter.

I find myself in an odd position. On the two issues addressed by my brothers, I find myself in Chief Judge Winter's camp. In my view, governmental authority cannot be ascribed to the union here, and hence there can be no constitutional violation. Nor, I believe, does § 8(a)(3) in itself prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Those arguments are fully adequate to rebut the contentions marshalled by Judge Russell. However, another set of considerations, raised by the plaintiffs[4] but not dealt with

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[4] In his dissenting opinion at the *en banc* level, Chief Judge Winter argues that the issue of the duty of fair representation was neither advanced by the parties nor considered by the panel majority. *Post*, at 1. It is true that, in the briefs and oral arguments, the duty of fair representation was overshadowed by the parties' emphasis on § 8(a)(3). However, that seems to have occurred because the parties, like the panel majority, believed that § 8(a)(3) provided a sort of "standard of care" for the duty of fair representation, and not because they believed that the plaintiffs' claim rested on § 8(a)(3) alone. A review of the record reveals the inaccuracy of the suggestion that the fair representation issue is of my own devising.

The duty of fair representation was initially raised as a ground for relief in the plaintiffs' complaint. Supplemental Appendix 15. Moreover, it is noteworthy that, although the issue was raised separately, the complaint also charged that the union's expenditure of agency fees violated its fiduciary duty to all bargaining unit

by Chief Judge Winter or by Judge Russell, has led me to the conclusion that the plaintiffs should prevail. It is one thing to be out of step with everyone but Johnny. It is even more lonely to find my vote the casting one, where that status derives from its alignment with five votes in favor of a rationale I disagree with and its operation to four votes whose rationale, to the extent expressed, I approve.

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employees. *Id.* at 12-15. The plaintiffs' failure, at that stage, to perceive a connection between their claims surely does not prevent this court from doing so.

The question of the duty of fair representation was raised again in the briefs submitted in connection with the initial hearing on appeal before a panel of this court. The defendants pointed out that because claims based directly on § 8(a)(3) are within the exclusive jurisdiction of the National Labor Relations Board, the plaintiffs would have to find an alternative basis for their statutory claim if they wished this court to consider it. Reply Brief of Appellants/Cross-Appellees 9-10. The plaintiffs responded with the argument that the statutory basis for their claim actually lay in the implied duty of fair representation. Appellees' Supplemental Brief 2-3. Although the plaintiffs did not clarify their view of the relationship between the basis of their claim in the duty of fair representation and their arguments under § 8(a)(3), the only reasonable interpretation of their position seems to be that they believed that § 8(a)(3) provided a convenient standard by which the presence or absence of a breach of the duty of fair representation could be tested.

Finally, the panel majority's opinion clearly considered and agreed with the plaintiffs' arguments concerning the fair representation issue. A close reading of that opinion reveals that the panel majority believed that the plaintiffs had two alternative statutory claims, one based directly on § 8(a)(3), the other based on the duty of fair representation. The panel majority concluded that the union's expenditure of agency fees was "not only a violation of the statute itself but also a violation of the duty of fair representation." 776 F.2d at 1203. The majority then explained, in an extensive discussion, that the presence of the fair representation claim provided the court with jurisdiction and defeated the argument that exclusive jurisdiction lay with the NLRB. *Id.* at 1203-04.

I.

The plaintiffs are twenty employees of the American Telephone and Telegraph Company and the Chesapeake & Potomac Telephone Company. Both employers have negotiated collective bargaining agreements with the Communications Workers of America (CWA). Both collective bargaining agreements contain an "agency shop" provision, which requires the employer to deny employment to any employee who refuses either to join the CWA or to pay the CWA agency fees equivalent to union dues. The plaintiffs are employees who are not members of the union, and who have regularly paid the required agency fees. The CWA and its locals use a part of the fees paid by the plaintiffs for purposes unrelated to collective bargaining, contract administration, or grievance adjustment.

The plaintiffs filed the present action in the United States District Court for the District of Maryland in June 1976. The plaintiffs alleged that the CWA had violated both its statutory duty of fair representation and the plaintiffs' First Amendment rights of freedom of expression by executing and enforcing the agency shop provisions in such a manner as to coerce the plaintiffs into paying fees which are not used for collective bargaining purposes. Although the union had adopted an internal procedure for the refund of the appropriate portion of dues and fees to employees who objected to such expenditures, the plaintiffs contended that the procedure was inadequate. The plaintiffs sought a declaratory judgment establishing the illegality of the exaction of fees for non-collective-bargaining purposes, an injunction against the CWA's continued use of agency fees for such purposes, and a monetary judgment for fees collected and used for such purposes in the past.

The CWA moved to dismiss the action because of the plaintiffs' failure to exhaust internal union procedures

for resolving the dispute, or, in the alternative, for a stay pending such exhaustion. The district court denied the motion. *Beck v. Communications Workers of America*, 468 F. Supp. 87, 90-91 (D. Md. 1979). The district court reasoned that deferral to the union's internal rebate procedure was not warranted where the plaintiffs alleged that the procedure itself violated their rights. The CWA does not appeal that decision.

The district court subsequently decided that the plaintiffs were entitled to the relief they sought. Addressing the question of restitution of amounts previously collected and improperly used, the court ruled that if the parties could not agree upon the sums to be refunded, the court would appoint a special master to make that determination. *Beck v. Communications Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979).

The parties were unable to agree on the amounts to be refunded, and a master was appointed. In his first report, filed August 18, 1980, the master found that only 19% of the CWA's total expenditures were made for purposes related to collective bargaining and contract administration, and he recommended that 81% of past agency fees collected by the CWA be refunded to the plaintiffs. The CWA filed exceptions to the report. The district court remanded the matter to the master, directing the master to make specific findings in response to questions prepared by the court. *Beck v. Communications Workers of America*, 106 LRRM 2323 (D. Md. 1981). The master filed a supplemental report in September 1981 which largely reaffirmed his earlier findings. The CWA filed exceptions to the supplemental report.

On March 5, 1982, while the district court was considering those exceptions, the union filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. The union contended that the plaintiffs' constitutional claim failed for lack of govern-

ment action, and that the statutory claim failed because the union's conduct did not violate the duty of fair representation.

The district court apparently ignored the union's motion to dismiss, thereby effectively denying the motion. Instead, the district court granted judgment for the plaintiffs for restitution of previously paid agency fees in specified amounts. The district court also permanently enjoined the CWA and its locals from retaining from the plaintiffs in the future the portion of their agency fees certified as non-retainable by an independent certified public accountant.

On appeal, the CWA raised two claims of error. First, it argued that its motion to dismiss the complaint should have been granted. Second, it contended that, if the complaint properly stated a claim, the district court and the special master had applied an erroneous standard of proof in determining the amount of the plaintiffs' refunds. Judge Russell, joined by Judge Chapman, held that the plaintiffs had properly stated a claim for violation of both their constitutional rights and the requirements of § 8(a)(3); they then went on to agree with the union that an enormous standard of proof had been applied. The panel therefore voted to vacate some of the special master's conclusions and to remand the case for further proceedings. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985). Chief Judge Winter, in dissent, concluded that the motion to dismiss the complaint should have been granted. *Id.* at 1214-25.

II.

Chief Judge Winter has, in my opinion, the better of the arguments as to whether the Communications Workers of America, in applying agency fees to non-collective-bargaining purposes, has infringed First Amendment rights of the plaintiffs or breached a statutory duty under § 8(a)(3). I simply do not perceive the existence

of governmental action sufficient to invoke the Constitution. Moreover, I agree with Chief Judge Winter that the courts do not have jurisdiction to consider a claim resting directly on § 8(a)(3). Claims based on conduct which arguably amounts to an unfair labor practice under § 8 of the National Labor Relations Act are within the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). While we may, of course, review the unfair labor practice determinations of the NLRB, § 8(a)(3) provides no right of action that is cognizable in the first instance in the federal courts.[5]

On the other hand, federal courts plainly have jurisdiction to decide claims for violation of a union's statutory duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 176-88, (1967). Because that duty does not arise from the NLRA's unfair labor practice provisions, such claims were originally thought to be outside the scope of the NLRB's jurisdiction. Somewhat belatedly, the NLRB decided that a union's breach of its duty of fair representation also constitutes an unfair labor practice under §§ 8(b)(1) and 8(b)(2). *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Nevertheless, in *Vaca v. Sipes*, *supra*, the Supreme Court explicitly held that the NLRB's assumption of jurisdiction did not deprive the federal courts of jurisdiction, despite the holding in *San Diego Building Trades Council v. Garmon*.[6] Thus, it is settled that

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[5] No siimlar jurisdictional problem exists with respect to the analogous provision of the Railway Labor Act, § 2, Eleventh, relied on by Judge Russell, which also authorizes the adoption of union shop and agency shop agreements. Unlike § 8(a)(3), § 2, Eleventh is not subject to the jurisdiction of an administrative board. Indeed, there is no administrative board under the RLA whose functions parallel those of the NLRB.

[6] The Court explained that:

> [A] primary justification for the pre-emption doctrine [announced in *Garmon*]—the need to avoid conflicting rules of

suits for breach of the duty of fair representation, unlike claims based on § 8(a)(3), are cognizable in federal courts.

Chief Judge Winter assumed, however, that the scope of the duty of fair representation, as it relates to the use of agency fees, is merely coextensive with the requirements of § 8(a)(3). He therefore concluded that, in the absence of a violation of § 8(a)(3), the fair representation issue was also necessarily resolved in favor of the union. It is at this point that I part company with Chief Judge Winter's analysis. The extent of the duty of fair representation is not identical to that of § 8(a)(3). The two statutory obligations are quite distinct. The duty of fair representation does not arise from § 8(a)(2) or from any of the NLRA's unfair labor practice provisions; rather, it is implicit in the statute as a whole. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).[7] Conduct that amounts to an

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> substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. . . . [A]s these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, ... Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.

Vaca v. Sipes, 386 U.S. at 180-81, 186.

[7] Insofar as the statutory source of the duty may be more precisely located, it is to be found in § 9(a) of the Act, which grants to recognized unions the privilege of acting as the exclusive bargaining representative of all employees. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966); *Price v.*

infringement of § 8(a)(3) may also violate the duty of fair representation, but it does not follow that there can be no fair representation breach in the absence of a § 8(a)(3) violation.

An analysis of the application of the duty of fair representation in the present case must begin with the threshold question whether the duty is implicated at all in the collection and spending of agency fees. A union's duty of fair representation extends only to the union's conduct in representing employees in dealing with their employer. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983). The union must abide by that duty, for example, in negotiating a collective bargaining agreement, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), or in adjusting an employee's grievance, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *Vaca v. Sipes*, 386 U.S. 171 (1967). On the other hand, the duty of fair representation does not apply to the union's treatment of employees within its own internal structure. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062-63 (5th Cir. 1980).

The duty of fair representation, however, extends to a union's collection and use of agency fees. If dissenting employees refuse to pay the portion of their fees that is to be used for non-collective-bargaining purposes, the employer is obligated, under the terms of the agency shop clause of the collective bargaining agreement, to discharge them. The matter thus involves the union's representation of employees in dealing with the employer, thereby implicating the duty of fair representation. In particular, the collection of agency fees from employees who are *not* union members can hardly be characterized as a purely internal union matter, because the union would

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United Auto Workers, 621 F.Supp. 1243, 1250 (D. Conn. 1985). That privilege carries with it the duty to represent all employees fairly. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 200-04 (1944).

have no power to coerce the payment of fees from such employees absent the threat of action by the employer.[8]

The duty of fair representation imposes on a recognized union an obligation that is fiduciary in nature. *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 201 (4th Cir. 1963).[9] The union's exclusive bargaining status, which involves a power to act on behalf of all employees, necessarily creates a relationship of trust. The Supreme Court has explained that the relationship between a union and the employees whom it represents is governed by the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). In effect, the union acts as the agent of the employees it represents, union and non-union alike. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944). As an agent, the union may not seek to further its own interests at the expense of a principal.

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[8] The issue here is thus very different from that presented in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), which held that the duty of fair representation was not implicated in a union's unilateral decision not to distribute strike benefits to non-union employees who honored a picket line but failed to participate in various strike activities. The union's refusal to pay strike benefits to a non-member who refused to participate in strike activities was properly characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union, and did not depend on, and indeed could hardly count on, the cooperation of the employer.

[9] *Accord, N.L.R.B. v. Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984); *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1014 (3d Cir. 1977); *Waiters Union, Local 781 v. Hotel Ass'n*, 498 F.2d 998, 1000 (D.C. Cir. 1974); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966).

Instead, the union must use the fees collected from employees only for purposes within the scope of the agency relationship.

With respect to employees who are not members of the union, the scope of the union's agency function is defined, not by mutual consent, but by law. Unlike traditional agency relationships, the association between a union and non-member employees is not shaped by the agreement of the parties, but is imposed by statute. Therefore, the scope of the union's agency function corresponds to the extent of its statutory authority to represent non-member employees. Because that authority is confined to collective bargaining, contract administration or grievance adjustment, it follows that agency fees may be used only for those purposes.[10]

It is not necessary now to decide whether the scope of the union's agency function—and hence the extent of its permissible use of employee funds—is the same with respect to union members as it is with respect to non-members. The contractual arrangements between the union and its members are not before us. Nor is it necessary to decide whether a union's use of members' dues for purposes outside the scope of its agency function should properly be remediable by the courts, or should be left to be resolved through internal union processes.[11]

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[10] Of course, it is possible that non-member employees might voluntarily choose collaterally to extend the statutory right of representation, and thereby contractually to use the union as their agent for some purpose unrelated to collective bargaining. To that extent, the scope of the union's agency function would be defined by mutual consent, and could be treated under traditional principles of contract law and agency law. Amounts spent by the union pursuant to such express authorization by non-member employees would not involve a breach of the duty of fair representation.

Here, however, there is no indication of mutual consent extending the union's authority beyond that spelled out by statute.

[11] Chief Judge Winter asserts, *post* at 4, that "[a]gency fees are the equivalent of union dues," and that for the purposes of

Those questions are not presented here, because none of the plaintiffs are union members.

My conclusion is not foreclosed by the legislative history of the Taft-Hartley Act, which is retraced in Chief Judge Winter's panel dissent. *Beck v. Communications Workers of America*, 776 F.2d 1187, 1215-18 (4th Cir. 1985). In the first place, it should be borne in mind that the 1947 Congress' failure to enact legislation imposing limits on union spending is an instance, not of positive action, but of inaction. As the Supreme Court has pointed out, "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). "'Unsuccessful attempts at legislation are not the best of guides to legislative intent,'" *id.*, *quoting Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 382 n.11 (1969), because, rather than indicating a clear intent, "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969).

Second, insofar as any congressional intent may be discerned from Congress' failure to act, the legislative

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regulating union expenditures members and non-members should be treated alike. That view overlooks an important distinction between members and nonmembers: members have the right to vote in union elections. By exercising their right to vote, union members can indirectly control the union's spending decisions. Nonmembers, who do not have a right to vote, lack any power over union policy-making and must trust in the good faith of union officials in protecting their interests. The union member's voting power might or might not justify a determination that the relationship between a union and its members is not sufficiently fiduciary to warrant judicial intervention with respect to expenditures of dues for non-collective bargaining purposes; that question is not before us here. What is clear, however, is that the non-union member, who lacks any means of imposing limits on the freedom of union officials to deal with his compulsory contributions, is in a situation quite different from that of the union member and of the kind that traditionally calls for judicial protection.

history indicates merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions. Nothing in the legislative history indicates that Congress intended to preclude the development of such restrictions by the courts under the principles of the duty of fair representation.[12] Finally, even if the legislative history of the Act may be read affirmatively to permit union expenditures of *members' dues* for purposes unrelated to collective bargaining—thereby foreclosing the possibility of a breach of the duty of fair representation based on such expenditures—the legislative history is altogether silent on the question of union uses of *non-members' agency fees.* The provisions of the House bill regulating the "reasonableness" of union exactions, which were ultimately rejected by the Conference Committee, were concerned only with members' dues, and not with fees paid by non-members. H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947). The opponents of those provisions, whose view prevailed in the final version of the statute, acted on the basis of a conviction that the government should avoid the policing of internal union affairs, H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (minority views); 93 Cong. Rec. 6601 (1947) (statement of Sen. Taft)—not of matters involving outsiders to the union.[13] There is simply no indication in the legislative history that Congress intended that unions should be free from legal accountability for their collec-

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[12] Congress was aware, at the time of the enactment of the Taft-Hartley Act in 1947, of the judicial implication of the duty of fair representation under the federal labor statutes. The duty had first been recognized three years earlier in *Steele v. Louisville & Nashville, R.R.*, 323 U.S. 192 (1944).

[13] Congress later overcame many of its objections to governmental intrusion into internal union affairs with the passage of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, which established a "bill of rights" for union members against their union leadership.

tion and use of non-members' fees.[14] The legislative history, then, poses no obstacles to the view that union

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[14] Chief Judge Winter argues, *post* at 4-6, that Congress in 1947 consciously adopted a "hands off" approach to unions' expenditures of agency fees. In my view, that inference is simply too tenuous to be accepted. None of the evidence pointed to by Judge Winter provides any real support for that conclusion. On the contrary, both § 8(d)(4) of the original House bill, *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 56-58 (1948), which was a precursor of the present proviso to § 8(a)(3), and the remarks of Senator Taft in the Senate debates, 93 Cong. Rec. § 4400 (April 30, 1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 1142 (1948), indicate that their authors were focusing on the question of union *membership*.

It is true that both the drafters of the House bill and Senator Taft endorsed the union shop, but the union shop is not the same as the agency shop. Both differ from the closed shop in that the employer is not obligated to hire employees only from among persons who are *already* union members. However, under a union shop arrangement, new employees must become, or at least seek to become, union members within a brief period after their employment commences. While the union may deny them membership, they cannot choose to remain nonmembers. In an agency shop, on the other hand, membership in the union is entirely optional. Judge Winter has pointed to nothing in the legislative history that suggests that Congress consciously focused on the latter kind of arrangement. The portions of the House bill and the Senate debates cited by the dissent reveal a concern for the would-be union member who is denied membership in a union shop arrangement, but they have no bearing on agency shops or agency fees.

No discussion of Congress' intent in the Taft-Hartley Act with respect to agency shop arrangements can ignore the Supreme Court's decision in *NLRB v. General Motors*, 373 U.S. 734 (1963). There, the Court held that the proviso to § 8(a)(3), which exempted union shop arrangements from prohibition as an unfair labor practice due to their discriminatory nature, also extended to agency shop agreements. The Court's decision was undoubtedly correct, but it was not based on a perception that Congress consciously considered the problem of agency shops in 1947. Rather, implicitly acknowledging the lack of evidence of any such conscious consideration, the Court looked to the interpretation that would be most consistent with "the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bar-

expenditures of agency fees collected from non-members for non-collective-bargaining purposes violates the duty of fair representation.

III.

Because I have concluded that the plaintiffs here are entitled to the relief they seek, I must, like Judge Russell and those aligned wth him, reach the union's second assignment of error—their contention that the special master and the district court applied the wrong standard of proof in determining which categories of union expenditures were permissible. On this issue, I agree that the proper standard is one of preponderance of the evidence, *Ellis v. Brotherhood of Railwaq Clerks*, 446 U.S. 435, 457 n.15 (1984), and that all disputed factual issues should therefore be remanded for redetermination under the correct standard of proof.

IV.

In recapitulation, it appears, on reading Judge Russell's *en banc* opinion, that:

1) The Court has concluded that the plaintiffs are entitled to relief, by a vote of five who find that the defendants have breached a duty imposed on them by § 8(a)(3), and of one who finds no violation of § 8(a)(3), but concludes that the duty of fair representation created principally by § 9(a) has been infringed, as against four who deny any statutory violation.

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gaining agent." *Id.* at 744. While that broad congressional purpose can easily support the conclusion drawn from it in *General Motors*, it simply cannot, without severe logical strain, be made the basis of an inference that Congress considered and rejected the posibility of any restrictions on unions' expenditures of agency fees. Indeed, if anything, it cuts the other way: imposing fiduciary responsibilities on unions with respect to agency fee expenditures would tend to reduce the burdens of compulsory unionism for the non-member employee, while at the same time guaranteeing the union financial support for its collective bargaining activities.

2) The constitutional grounds asserted as a basis for recovery by the plaintiffs have received support from Judge Russell and Judge Chapman. Five members of the Court (Chief Judge Winter, Judge Hall, Judge Phillips, Judge Sprouse and I) have concluded that no such constitutional basis for relief exists. Three Court members (Judge Widener, Judge Ervin and Judge Wilkinson) have not reached the question, considering it unnecessary to do so in light of the posture of the Court on the statutory issue.

3) By a vote of six, the Court has decided that there must be remanded for a proper allocation as among permissible and impermissible expenditures chargeable to the plaintiffs such items as were not specifically determined in the panel majority opinion to be permissible or unallowable. The remaining four members of the Court have not reached the question.

WINTER, Chief Judge, dissenting:

For the reasons set forth in the dissenting panel opinion, Beck v. Communications Workers of America, 776 F.2d 1187, 1214-25 (4 Cir. 1985), I conclude that the judgment of the district court should be reversed and it should be directed to dismiss the complaint.[1] From a contrary disposition, I respectfully dissent.

Although the dissenting panel opinion sets forth what I consider to be the correct resolution of the legal is-

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[1] The dissenting panel opinion spoke to the issues of state action and the duty of a union under § 8(a)(3) of the National Labor Relations Act because the panel majority based its judgment on both. The in banc majority has declined to consider the issue of state action. It is interesting to note, however, that the Second Circuit in Price v. International Union, —— F.2d —— (July 16, 1986), has emphatically rejected the view of the panel majority on the state action issue.

sues presented by this appeal, I am constrained to comment on the separate opinion of Judge Murnaghan.

The thesis advanced by Judge Murnaghan is essentially one of his own devising. It is not one advanced by the parties and litigated by them. Although the in banc per curiam opinion now claims that the majority panel opinion rested, in part, on Judge Murnaghan's theory, the weakness of the claim is fully exposed in note 3 of what Judge Murnaghan has written. Certainly a single obscure reference in almost twenty-five pages of text, is a fair indication that not much reliance was put on the theory.

In any event, Judge Murnaghan expresses the view that while § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), does not prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, a union's duty of fair representation under § 9(a) of the Act, 29 U.S.C. § 159, prohibits such expenditures with agency fees collected from dissenting employees. Judge Murnaghan's view does not withstand close scrutiny.

The duty of fair representation is a judicial doctrine derived from the statutory duty of representatives designated or selected for the purposes of collective bargaining to "be the exclusive representatives of *all* of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." § 9(a) (emphasis added)". The doctrine was first formulated with respect to the Railway Labor Act, Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944), and it was extended to the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). As described in Vaca v. Sipes, 386 U.S. 171, 177 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated

> unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

As the cases demonstrate, the doctrine is generally invoked to redress discriminations by a union on the basis of race, because of animosiy toward a member of the bargaining unit, in short, because of any irrational, unequal, unfair treatment of a member of the bargaining unit. It has been held that the doctrine is inapplicable to internal union matters that do not involve the employer such as the expenditure of dues. *See* Price v. International Union, —— F.2d —— (2 Cir., July 16, 1986).[2] It hardly seems applicable where the union's challenged expenditures were made equally on behalf of all members of the collective bargaining unit, dues paying union members and agency-fee paying nonunion members alike. Absent proof that a union acted arbitrarily, discriminatorily, or in bad faith in spending its revenues, there is no breach of the duty of fair representation even if the employer is also involved. *See Price, supra.*

More importantly, it would seem obvious to me that the duty of fair representation, derived from § 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do. As the dissenting panel opinion spells out in detail, 776 F.2d at 1215-18, Congress was fully aware of proposals to limit the use of monies collected from mem-

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[2] *Price* also points out that suit for breach of the duty of fair representation will ordinarily not be entertained until there has been an exhaustion of internal union remedies. Whether there was exhaustion of any available remedies in this case is far from clear. Perhaps non-exhaustion was the reason why the parties did not advance the argument constructed by Judge Murnaghan.

bers of the bargaining unit for purposes not directly related to collective bargaining, grievance adjustment, etc. It took testimony protesting the expenditure of such monies for political purposes, and it considered a number of legislative proposals to prohibit or severely limit such expenditures. In the final analysis, it rejected all of the proposed restrictions and enacted legislation only limiting excessive or discriminatory initiation fees for union membership, 29 U.S.C. § 158(b)(5), and prohibiting the use of monies collected in connection with federal elections, 2 U.S.C. § 441(b)(3).[3] It is abundantly clear from the legislative history of these provisions that more stringent regulation was rejected as a matter of legislative judgment and not because of any thought that regulation was unnecessary because the judicial doctrine of fair representation established at the time that Congress considered the issue of regulation accomplished that result.[4] From my study of the legislative history, I think

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[3] Plaintiffs make no claim that either of these restrictions was violated.

[4] It is disingenuous to assert that the members of Congress who vigorously debated the union security provision of § 8(a)(3) were aware that regardless of their legislative compromise, the judiciary remained free to imply additional limitations under the duty of fair representation. *See ante* at 22 & n.11 (Murnaghan, J., concurring). It is true that the Supreme Court first recognized that duty in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) three years before Congress enacted the Taft-Hartley Act. But *Steele* merely held that under the Railway Labor Act, a union could not refuse to represent black employees in the collective bargaining process because it had a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 203. Unlike the present case where Judge Murnaghan implies from the Act a limitation that Congress rejected, the *Steele* could could fairly state that a duty to represent all the workers of a unit in collective bargaining with the employer "expresse[d] the aim of Congress." *Id.* at 202. Three years later when Congress decided as a matter of national labor policy to reject proposed limitations on union dues, it is untenable to think that it was "aware" that the *Steele* decision

it sheer sophistry to assert that Congress decided on a course of very limited regulation only with respect to dues from union members and not also with respect to agency fees. Agency fees are the equivalent of union dues, and it is inconceivable to me that Congress specifically intended not to regulate the expenditure of union dues except in minor respects but, by mere silence, intended the expenditure of agency fees to be regulated under the judicial doctrine of the duty of fair representation.[5]

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might serve to accomplish the same thing. It is testament to the unforeseeability of this reading of *Steele* that no other court has expanded the duty of fair representation for nearly forty years.

[5] Judge Murnaghan argues, *ante* at 22-23, that the legislative history only shows that Congress rejected limits on union expenditures of *members'* dues, leaving open the possible regulation of nonmembers' agency fees. It is true that the provisions of the House bill limiting initiation fees and dues to "reasonable" amounts expressly applied only to "members." H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). But the union security agreement provision of that bill, § 8(d)(4), much like the present § 8(a)(3), would have made it an unfair labor practice for the employer to deny employment to individuals whose membership was denied despite their "tender[ing] to the [labor] organization the initiation fees and dues *regularly imposed as a condition of membership therein* . . . ." Nonmembers had a right to work under this bill if they tendered the dues "regularly imposed" on *members*, and, thus, through § 8(d)(4) the reasonableness limitations would have applied to agency fees. In rejecting this bill, Congress rejected the regulation of fee collection from members *and* nonmembers for reasons applicable to both. The House Minority Report criticized the bill's attempt to monitor union fees as an undue regulation of unions' internal affairs that, as a practical matter, was unenforceable because of "the infinite details involved in the internal functioning of thousands of trade-unions having millions of members." H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (Minority Report); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). As the dissenting panel opinion notes, the proceedings of this one case, requiring over nine years, over 4,000 pages of testimony, over 3,000 documents, two district judges and a special master, "exemplify

As I view it, the concurring opinion simply fails to appreciate the delicate compromise the Taft-Hartley Act managed to achieve. Congress considered the arguments of those who sought to prohibit all union security agreements, and those who wished to retain all such agreements, including the "closed shop." Senator Taft took a middle position, distinguishing between closed shops and the "union shop." Under his compromise, an employee could work at a unionized facility without acquiring membership, but only as long as he "pa[id] the same dues as other members of the union." 93 Cong. Rec. § 4400 (daily ed. April 30, 1947), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, at 1142 (1948). Senator Taft explained that the bill thus prohibited the closed shop and guaranteed that a worker could "get a job without joining the union or asking favors of the union . . . ." 2 Legislative History, *supra*, at 1422. Once assured of this right to work without union membership, however, Senator Taft asserted that "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important." 2 Legislative History, *supra*, at 1422. *See also id.* at 1010-11, 1096-97, 1403 (remarks of Senator Taft). Thus, the compromise that became law intended to permit union security agreements requiring nonmembers to tender the same dues to the union that members regularly paid. So far as payments to the union were concerned, members and nonmembers were on a parity and treated alike. In deciding whether to disturb this legislative solution, we should be guided by the Supreme Court's reasoning in Local 1976, United Brotherhood of Carpenters and Join-

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precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection." *Beck*, 776 F.2d at 1218 (Winter, C.J., dissenting). The result is identical, and equally offensive to Congressional intent, whether accomplished through the interpretation of § 8(a)(3), or the expansion of the duty of fair representation.

ers v. N.L.R.B., 357 U.S. 93, 99-100 (1958), deciding a secondary boycott issue:

> It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's.

Thus I would conclude that when a union expends agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, not otherwise specifically prohibited by the Act, such expenditures are not outlawed under the duty of fair representation.

Judges Hall, Phillips, and Sprouse authorize me to say that they concur in these views.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellants,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: November 1, 1984. Decided: October 24, 1985

Before WINTER, Chief Judge, and RUSSELL and CHAPMAN, Circuit Judges.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/Cross-Appellees; Edwin Vieira, Jr. (Joseph J. Hahn on brief) for Appellees/Cross-Appellants.

RUSSELL, Circuit Judge:

Plaintiffs in this suit are twenty non-union employees [1] of either the American Telephone and Telegraph Company (AT&T) or its subsidiary Chesapeake and Potomac Telephone Company (C&P) and, as such, are subject to an "agency shop" agreement [2] negotiated between the employers and the Communications Workers of America (CWA) and its locals as the exclusive bargaining agents of such employees under the terms of section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3).[3] Plaintiffs are required under the agreement to pay agency fees to CWA through its locals in an

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[1] A number of other employees joined as plaintiffs while suit was proceeding.

[2] Professor Cantor has explained that an agreement as authorized under § 8(a)(3) creates actually an "agency shop":

> Although the statutory language refers to union 'membership' as a condition of employment, the NLRA has been interpreted to refer to 'financial core membership' rather than full union membership. Thus what appears to be a union shop authorization is actually an agency shop authorization.

Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 n.2 (1983).

[3] Plaintiffs' employers and the AFL-CIO were named as defendants in the complaint, but on motion they were dismissed as defendants leaving only CWA and its locals as defendants in the action. There is no appeal from this dismissal.

amount equivalent to the dues paid by union members. Their complaint is that defendants CWA and its locals have expended a part of their agency fees for purposes unrelated to "collective bargaining, contract administration, and grievance adjustment." Plaintiffs' claim such expenditures constitute a violation of their First Amendment rights of free speech and association justiciable under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and a violation of defendants' duty to fairly represent all employees justifiable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a).[4] Plaintiffs sought a declaratory judgment against defendants establishing the illegality of the excessive exactions, injunctive relief against continued illegal exactions by CWA and its locals, and monetary judgment for past illegal collections by CWA and its locals.

CWA alleged in its answer that "all actions taken by CWA defendants [were] consistent with the duties and obligations imposed [upon CWA] as recognized or certified collective bargaining representative of the plaintiffs under the National Labor Relations Act." They also asserted that plaintiffs were without standing to maintain the action, that plaintiffs had failed to exhaust available internal union remedies, that the court lacked jurisdiction over the subject matter of the action, and that the action was barred by the statute of limitations.

After informal discovery, defendant CWA moved to dismiss the action for failure of plaintiffs first to exhaust internal union procedures or, alternatively, for a stay

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[4] Jurisdiction in actions such as this are sometimes sustained under 28 U.S.C. § 1337, and at other times under § 185 of the Labor-Management Relations Act, 29 U.S.C. § 185, or under both. For an instance of an action maintained under § 185, *see Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-412 (10th Cir. 1971). The action, however, was later dismissed on the ground that the union had "adopted a complying intra-union remedy" in the form of a good faith rebate procedure. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973).

pending such exhaustion.[5] CWA submitted in support of the motion a resolution of the Executive Committee of CWA adopted on June 19, 1974. This resolution provided that:

> Any member or non-member who is covered by a collective bargaining agreement containing a 'Union Shop' or 'Agency Shop' provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

The resolution further provided that the Administrative Committee of the Executive Board of CWA should determine the approximate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year. By affidavit, defendants said that for the year ending March 31, 1976, the impermissible expenditures for political purposes amounted to 7.63 percent of the fees collected. CWA also alleged that its auditors were attempting to arrive at, for use in succeeding years, a figure estimating the proportion of expenditures made by the unions for political purposes. Should any member or non-member object to the allocation determination, he could appeal to the Executive Board and from the Executive Board to the Union Convention.[6]

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[5] It is significant that defendants did not in their motion to dismiss raise the jurisdictional objection that plaintiffs' constitutional claim failed because of the alleged absence of "state action," though several years later, as we later note, they raised this point.

[6] There can be little doubt that this resolution had its genesis in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963), in which the Supreme Court, in dealing with objections to the exaction under the Railway Labor Act (RLA) of union dues to be used for impermissible purposes, threw out this observation: "The difficulties in judicially administered relief [in fashioning a

The district judge advised both parties that, preliminary to a hearing on defendants' motion for summary judgment based on their rebate procedure, he wished the advice of counsel on the impact of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) on the issues in the case. Counsel for CWA responded in a letter dated June 3, 1977 and incorporated as a part of the record in this case. After indicating that *Street*[7] and *Hanson*[8] arose under the RLA and that *Abood* dealt with public employees, CWA's counsel expressed the opinion that *Abood* was not directly in point. But he added:

> The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate

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remedy for a violation under the RLA] . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." This idea was repeated in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240 (1977).

As a result of this observation, unions generally developed rebate schemes somewhat similar to that adopted by CWA and such rebate schemes became the first line of defense by unions in suits such as this one. Many of these rebate schemes, however, were fairer than the one involved in this case, where the right of appeal by the dissenting employees is restricted to a union-constituted body and never to an impartial board. *Cf. Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 685 F.2d 1065, 1069 (9th Cir. 1982), in which "[a]ny employee who believes his or her rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals." The rebate scheme in *Ellis*, with its more impartial appeal scheme, was, however, found invalid on other grounds by the Supreme Court in *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, —— U.S. ——, ——, 80 L.Ed.2d 428, 439 (1984). Prior to *Ellis*, courts had varied in their treatment of this defense. *Reid v. International Union*, 479 F.2d at 520; *Perry v. Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983).

[7] *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

[8] *Railway Employee's Dept. v. Hanson*, 351 U.S. 225 (1956).

> that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees. Several lesser courts have so held. The problem is that the Supreme Court appears to use the terms 'ideological purpose,' 'political purposes,' and 'purposes other than collective bargaining,' interchangeably. The Court gives little guidance as to which expenditures it considers to be refundable to an agency fee payor.

CWA's counsel concluded his letter with this statement:

> If plaintiffs are willing to agree that the Supreme Court decisions mean only that the Union defendants must make a provision for pro-rata refund of that portion of the dues dollar expended upon political activities, the procedure is in effect [under the resolution of the Executive Committee] and this case should be settled. If plaintiffs intend to insist upon a much broader interpretation of those expenses for which they feel they are not responsible, no settlement is in sight. . . . [and plaintiffs must proceed under the appeal procedure established by the resolution.] [9]

Plaintiffs did not agree to submission to CWA's internal union remedies and the matter came on for determination by the district judge. Finding exhaustion of internal union remedies not required,[10] the district judge proceeded to find that the agency shop agreement was valid subject to the limitation that CWA could not "collect and disburse [as the exclusive bargaining agent under such agreement] such 'agency fees' for purposes other than 'collective bargaining, contract administration, and

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[9] It will be noted that defendants did not in this letter raise or indicate that there was any jurisdictional defect in the proceedings.

[10] There is no appeal from this decision. The inadmissibility of the exhaustion defense, with its reliance on the union's rebate procedure, is therefore not an issue on this appeal.

grievance adjustment' without seriously implicating the first amendment rights of free speech and association of fee payors who object." *Beck v. Communications Workers*, 468 F.Supp. 93, 96 (D.Md. 1979) (quoting *Abood*, 431 U.S. at 225-226). On the basis of that finding, he denied defendants' motion to dismiss and granted a declaratory judgment that collections by the union from objecting employees in an amount "beyond that allocable to collective bargaining, contract administration and grievance adjustment" were illegal as violative of "the first amendment rights of the plaintiffs." 468 F.Supp. at 97. He ruled that it was necessary to determine "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment," and, in that determination, he said: "[t]he burden of proving such proportion rests upon the union, but '[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required.'" *Id.* (quoting *Allen*, 373 U.S. at 122). Finally, he provided that if the parties were unable to agree within thirty days on the amount to be refunded under the guidelines as stated by him, the matter of allocation should be referred to a master for the purpose of determining "what portion of the agency fees the defendant has collected improperly."

Since there was no agreement between the parties on the proper allocation, a special master was appointed. At the initial hearings before him, the special master received twenty-eight days of testimony and argument as well as 2,100 documentary exhibits. In his first report, filed August 18, 1980, he found that only 19 percent of CWA's total expenditures were related to and were reasonably necessary for the proper effectuation of permissible purposes. The special master accordingly recommended that CWA be ordered to refund to plaintiffs 81 percent of the agency fees collected in the past and that CWA be enjoined from collecting from plaintiffs more

than 19 percent of the dues and assessments charged CWA members.

After the filing of the special master's report, CWA moved the district court to remand the matter to the special master. In support of the motion, CWA filed a memorandum stating:

> A re-reference is initially required because the master failed to determine the extent of the plaintiffs' financial obligation as to the 60% of the agency fees retained by the local union, although the issue was part of the reference to the master. Re-reference to the master is also appropriate because the national union is prepared promptly to provide a new basis for the determination of its future entitlement, a circumstance which the master recognized would warrant further proceedings and, upon proper proof, an injunction different from the terms proposed in the master's August 1980 report. *The national union proposes to meet the master's proof requirements by (1) offering a full return to the plaintiffs of their entire fee payment to the national union from its beginning in 1976 to the end of the present fiscal year [1980], and (2) utilization during the final third of the national union's 1980 fiscal year, which commences on December 1, 1980 of contemporaneous time records for officers and employees which will provide a basis for determination of the plaintiffs' financial obligation to the national union thereafter.* (emphasis added)[11]

Time for filing exceptions to the report of the special master was extended until after determination of the

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[11] Again, it is of interest that defendants at this point did not indicate that a jurisdictional problem existed. Actually, the statement of position suggested that defendants in effect conceded the partial invalidity of their collection and use of the dues-equivalent and thus conceded partial liability.

motion to recommit. In the meantime, Laurence Gold, Esquire, had been retained as lead counsel for CWA in this litigation. He wrote counsel for plaintiffs a letter dated October 16, 1980, made a part of the record in this proceeding, in which he proposed:

> As a result of my discussions with the CWA national union, I have now been authorized to advise you that the national offers to pay to the individual plaintiffs in the above-noted case the full amount of monies paid by them as agency fees to the defendant CWA national union from January 1, 1976 to date and to waive such fees through the balance of the national's current budget year, *provided* that the parties can agree upon, and the District Court will enter, an order which will preserve for review without any *res judicata* or estoppel effect all issues which either party may wish to raise with respect to: (a) Judge Blair's rulings regarding the expenditures which may and may not lawfully be charged to agency fee payors and (b) all rulings of the master other than his factual findings allocating expenditures in accordance with those rulings.[12]

The district judge proceeded to grant the motion to recommit, but in so doing, he identified precisely the issues to be addressed on the recommital and provided that those issues should be resolved without further testimony unless the special master "deems it appropriate." *Beck v. Communications Workers*, No. M-76-839, slip op. at 3 (D.Md. Jan. 19, 1981). In connection with the objection of defendants to the absence of specific findings on the liability of the local unions, the district judge directed the special master to make findings in response to these questions:

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[12] It will be noted that counsel made no reference to any claim of want of jurisdiction over the cause in their statement of the issues on which they wished to reserve the right to object.

(1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

(2) What percentag of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Id. at 2-3. The special master was also directed to make these additional findings in connection with future injunctive relief:

(1) Do the unions' current recordkeeping policies in any way alter the factual findings previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior orders in this action? *Id.* at 3.

After taking additional testimony, the special master filed his supplemental report in September, 1981. In this report he proceeded to answer the specific questions addressed to him by the district court. He found, in response to the first two questions posed relating to the liability of the local unions, that his "calculations of applicable percentages of permissible and impermissible expenditures by CWA [were] applicable to and control the expenditures by the four Local Unions, i.e., Local 2100, Local 2101, Local 2108 and Local 2110, including, of course, the 60 percent of the fees in question retained

by the Local Union Defendants." He added that "[t]his is *implicit* in the calculations appearing in Appendix F attached to the Original Report." The special master excused any lack of detail in his original report in this regard because of his desire to avoid unduly expanding his report, "especially when the Special Master concluded that the same deficiencies in meeting the required burden of proof to establish expenditures made for the three permissible categories—collective bargaining, contract administration and grievance adjustment—applicable to the CWA expenditures were also applicable to the Local Union expenditures." He found that, "giving the locals the benefit of every doubt," he could not find that more than 19 percent of the locals' share of the exacted fees were used for permissible purposes under the guidelines earlier stated by the district judge. In response to the other questions with which he was directed to report, he found that the unions' current record-keeping policies did not in any way alter his previous factual findings. He found that the new system proposed by the unions for future allocation of permissible costs, as reviewed in the testimony, was 'generally sufficient, prima facie to enable CWA to meet its burden of proof [i.e., by the standard of "clear and convincing" proof],' provided certain defects and omissions, detailed by the special master, were corrected or supplied. He concluded, however, that the system of calculation could not be made self-executing and would require periodic monitoring.

CWA and the local unions filed exceptions to the initial report and the supplemental report of the special master. In general, the objections of both the national and the local unions present the same contentions. The objections to the special master's findings of fact are stated in broad language and are incorporated in two general claims: First, they claim "[t]he categories of rebatable expenditures [by defendants as found by the special master] are too broad in that they give plaintiffs credit

for CWA expenditures in addition to those for political and ideological activities unrelated to collective bargaining"; [13] and second, the special master placed the burden of proof by "clear and convincing evidence" on the unions to establish the retainable portion of the agency fees paid by dissenting employees and drew inferences adverse to the unions for their failure to produce records.

Plaintiffs also filed objections to the special master's reports. In effect, they objected broadly that the special master had been too generous in its allowance of permissible expenditures by the unions against the claims of plaintiffs. They also found objectionable the conditional approval expressed by the special master of the union's proposed procedure for determining the amount of plaintiffs' agency fees to be refunded. Finally, they took exception to the special master's recommendation that plaintiffs "bear 19% of the costs of proceedings in which they are the prevailing parties."

On March 5, 1982, while the district judge was considering the objections of the parties to the special master's initial and supplemental reports, the unions petitioned for leave to file a Fed.R.Civ.P. 12(b)(6) motion for dismissal on the ground "that plaintiffs' complaint fails to state a claim upon which relief can be granted." In their memorandum in support of their motion, the unions referred to both plaintiffs' First Amendment cause of action and their claim that the unions' violated their duty of fair representation as set forth in plaintiffs' "Second Claim for Relief" appearing "in paragraphs 26, 27, and 28" of the complaint. Their position on the constitutional claim was that there was an absence of governmental action, which is a prerequisite for a justiciable First Amendment claim. They would fault the claim of a violation of the duty of fair representation

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[13] The exceptions do not identify specifically any expenditures which were improperly disallowed except those relating to "organizing."

because the agency shop is specifically authorized by statute, thereby validating the collection by the unions of the agency fees from dissenting non-union employees such as plaintiffs and that *after collection, the unions have "a due process right to spend the funds in any manner [they choose]."* (emphasis added)

The district court dismissed *sub silentio* defendants' 12(b)(6) motion and proceeded to sustain substantially the special master's recommendation with but slight variations. The court first corrected a mathematical error made by the special master, thereby increasing to 21 percent the amount properly chargeable to the agency fee payor plaintiffs. *Beck v. Communications Workers*, No. M-76-839, slip op. at 12-13 (D.Md. Aug. 9, 1983) (memorandum and order). Furthermore, the court modified the special master's recommended injunction by ordering CWA, after collecting 100 percent of the agency fees, to return to plaintiffs that percentage of such fees determined by an independent certified public accountant to be non-retainable as attributable to expenditures unrelated to collective bargaining, contract administration, and grievance adjustment. *Beck v. Communications Workers*, No. M-76-839, slip op. at 2-3 (D.Md. Aug. 9, 1983) (judgment). The district court also ordered CWA to maintain, for each fiscal year, an interest-bearing escrow account containing twice the amount determined in the previous fiscal year to be non-retainable. *Id.* at 3. In addition, the injunction provided that only if plaintiffs successfully challenged the amount determined to be non-retainable would CWA bear the cost of such challenge. *Id.* at 3-4. This appeal followed with both plaintiffs and defendants excepting to the rulings and conclusions of the district court. We address first the exceptions of defendants.

After six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions, defendants, in

their brief in this court, limit themselves to two claims of error, the first of which raises a question of a federal justiciable claim not advanced by defendants until they filed their motion for judgment under Rule 12(b)(6) made only after all evidence had been received and after the cause was ripe for disposition on the merits.[14] Their other claim of error relates to the standard of proof to be used in resolving plaintiffs' claim for a refund. The first claim of error by defendants to which defendants devoted almost eighty percent of their initial brief in this court, is directed at plaintiffs' claim that the collection and use of fees exacted of them by defendant unions under the authority of the agency fee agreement, for purposes other than those "germane to collective bargaining," are violative of plaintiffs' free speech and association rights under the First Amendment and their due process rights under the Fifth Amendment. Jurisdiction of such a constitutional action, plaintiffs opined, existed under 28 U.S.C. 1331. Defendants, on this appeal, contest that position. It should be emphasized at the outset that in raising this belated jurisdictional claim defendants do not dispute the factual base for plaintiffs' constitutional claim. The district judge found, within a

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[14] While the lateness of this claim may not be a bar to its consideration, nonetheless the failure of defendants to raise such contention until after all evidence had been taken and after defendants had consistently in the protracted proceedings acted on the assumption that there was jurisdiction of the subject matter is conduct not to be commended. Such delay places an intolerable burden on orderly and efficient judicial administration. They had earlier raised other defenses, all in vain, and CWA had actually offered on two occasions to rebate all collections of dues from dissenting non-union employees. The defense offered by defendants for their delay is that they did not raise the jurisdictional claim in 1979 because the jurisdictional ruling was unexpected. This excuse might have some credibility if defendants had acted promptly but to delay for years to raise the point undercuts the reasonableness of the excuse.

few months after this action was begun—on showings largely made by defendants themselves—that:

> In this case it is undisputed that the defendant union, CWA, has negotiated an 'agency shop' clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. . . . It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than 'collective bargaining, contract administration, and grievance adjustment.' Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three enumerated ones.[15]

Defendants have never contested those findings.

The legal basis asserted by defendants for this claim of lack of jurisdiction in the federal courts over the constitutional claim of plaintiffs is, to quote defendants' statement of their position in their brief, that "the plaintiffs' First Amendment claims fail because the defendant unions' negotiation of a union security clause valid under the National Labor Relations Act, as amended, and under applicable state law and the unions' expenditure of agency fees collected under such a clause is not state action subject to constitutional constraints." Brief for Appellants at 14. They concluded this statement of their position with: "If our position in this regard is accepted, the judgment of the district court should be reversed and the plaintiffs' constitutional claims should be dismissed." *Id.*

It would seem fair to assume from this statement of their position by defendants that, in their view, plaintiffs' case is restricted to a constitutional claim, and if

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[15] *Beck v. Communications Workers*, 468 F.Supp. 93, 96-97 (D.Md. 1979).

the constitutional cause of action fails for lack of jurisdiction, plaintiffs are without a federal judicial remedy. This assumption is further indicated by the failure of defendants in their initial brief even to notice or discuss plaintiffs' statutory claim. We take it that defendants posited that, since in their view the ruling of the district judge rested on constitutional grounds, the federal jurisdictional basis for judgment herein must stand or fall on whether jurisdiction can be sustained over plaintiffs' constitutional claim.

It is, however, a settled rule of appellate procedure "that a decision of the district court is not to be reversed if it has reached the correct result, even though the reason assigned by it may not be sustained." *See Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073, 1093 (4th Cir. 1979). The complaint herein states in separate counts not merely a cause of action charging a violation of the First Amendment in the compelled payment of the dues-equivalent under threat of loss of job, but also a cause of action under section 8 (a) (3) of the NLRA as construed by the Supreme Court, and related thereto, a violation by defendants of their duty of fair representation. Only if jurisdiction of these claims under section 8(a) (3) itself is non-existent would a dismissal of this action for lack of jurisdiction be appropriate. Nor would this result be different because the district court may have decided jurisdiction on the assumption that plaintiffs' action was based on the unconstitutionality of the compelled payments. If the judgment can be sustained because of jurisdiction over either the constitutional or the statutory claim of plaintiffs, the judgment will be sustained, though, as we later observe, courts prefer to decide the issue by a construction of the statute if confrontation of the constitutional issue can thus be avoided. That this is the accepted practice is illustrated by the decision of the Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

That case, which involved similar constitutional and statutory issues to those posed there under a similar statute and agency contract, was decided in the state court on constitutional grounds. On appeal, plaintiffs apparently pressed the constitutional claim. The Supreme Court, however, decided the case on statutory grounds, thereby avoiding review of the constitutional issue.

In their reply brief in this court, it is accordingly understandable that defendants chose not to persevere in their argument that the judgment herein must be reversed if the constitutional claim of defendants is not accepted, and defendants recognized the necessity of addressing the statutory claim, the maintenance of which did not require "state action." Since it seems clear to us that plaintiffs have stated a good cause of action for a violation of section 8(a)(3) of the NLRA redressable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a), as well as a claim of a violation of the duty of fair representation justiciable under 28 U.S.C. § 1331 and 29 U.S.C. § 185(a), we shall deal with this question before addressing the right of plaintiffs to maintain a constitutional claim on the same facts. We begin by considering both the language of and the legislative purpose of section 8(a)(3) of the NLRA, which provides the basis for plaintiffs' statutory claim.

Section 8(a)(3), added to the NLRA by the Labor-Management Relations Act of 1947 (Taft- Hartley Act),[16] provides permissive authority for an agreement between an employer and the exclusive union bargaining representative, selected in conformity with the terms of the NLRA, whereby employees are required to have union "membership" as a condition of employment, subject however, to the express condition that no employer could dis-

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[16] Act of June 23, 1947, ch. 120, Title I, § 101, 61 stat. 136, 140-141.

charge an employee "for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3)(1983). The legislative purpose of section 8(a)(3), as evidenced in the legislative record, was twofold: First, Congress intended the elimination of the closed shop and the substitution of the union or agency shop; second, in response to the plea of the unions that the existing statute encouraged "free riders," employees who enjoyed the benefits of collective bargaining but shared none of the costs of the bargaining process, it included the "membership provision or requirement. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); Legislative History of the Labor-Management Relations Act, 1947, at 413, 1422 (1948) (statements of Senator Taft); *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. 407, 426 (1976) (Stewart, J., dissenting); *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963).

However, the "membership" requirement was quickly "whittled down to its financial core," because the Supreme Court found that "[t]his legislative history [of the statute] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *NLRB v. General Motors Corp.*, 373 U.S. at 742 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954)). Accordingly, "[i]f an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a normal member."

NLRB v. General Motors Corp., 373 U.S. at 743.[17] Thus, the extent of the objecting employee's obligation under the union or agency contract is the payment of dues, and the legislative history reveals that the obligation to pay dues was, it would seem, directly related to the costs of the collective bargaining itself.[18]

Prior to 1950, railroad workers, on the other hand, had been denied the right to have a union or agency shop. They sought similar rights to those enjoyed by employees in other industrial fields under section 8(a)(3). Congress responded to this demand by enacting section 2, Eleventh of the Railway Labor Act (RLA).[19] Evident of its intention merely to give railway workers similar rights to those of other workers under section 8(a)(3), "Congress [in phrasing section 2, Eleventh] simply tracked the language of Section 8(a)(3) of the Taft-Hartley Act." T. Haggard, *Compulsory Unionism, The NLRB And The Courts* 115 (1977). Further, the legislative record is replete with responsible representations that the intent was to confer on railway workers simply the same rights other workers had under section 8(a)(3). *Id.* at 127. Senator Hill, the manager of the bill in the Senate, assured the Senate that the intention of section 2,

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[17] This follows the comments of Representative Klein that while the statute purports to allow a union shop, the practical effect of the statute's insulation of ousted members against being fired by the employer so long as dues were paid was to "allow only a requirement that dues be paid." Legislative History of the Labor-Management Relations Act, 1947, at 655 (1948).

[18] Professor Cantor in his article, *Uses and Abuses of the Agency Shop, supra* note 2, at 75 n.64 recognizes this:

> "Where Congress has authorized compulsory extraction of a fee from workers in a represented unit, the monies must be spent in a manner consistent with the purpose for which the fee is extracted, effective representation of workers."

[19] Act of Jan. 10, 1951, ch. 1220, 64 stat. 1238-1239, codified at 45 U.S.C. § 152, Eleventh (1983).

Eleventh was "merely to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in industry generally." 96 Cong. Rec. 15,737 (1950). Senator Taft, the co-author of section 8(a)(3), was equally explicit. He declared during debate that section 2, Eleventh "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." 96 Cong. Rec. 16,267 (1950). *See also* S.Rep. No. 2262, 81st Cong., 2d Sess. 3, 5 (1950); H.R. Rep. No. 2811, 81st Cong., 2d Sess. 405 (1950).

As is obvious, it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA.[20] It is inconceivable that two such statutes would be construed differently. For this reason it seems fair to assume that the construction given one by the Supreme Court would be equally applicable to the other, and we proceed on that basis in construing section 8(a)(3).

The first consideration of either of these statutes by the Supreme Court was in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). In that case, which involved a charge of unconstitutionality against section 2, Eleventh under the First Amendment free speech and association clause and the due process clause of the Fifth Amendment, the Court found the statute,

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[20] It is true there are differences between the RLA and the NLRA, and where there is "difference in the language and scheme of the two statutes" there will be differences in the application of the provisions of such Acts. *See Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). This is not such a case. There is like statutory language and like legislative purpose here and, therefore, like statutory construction.

which authorizes the collection of a dues-equivalent from non-union, objecting employees by an exclusive bargaining representative of the employees, valid so far as the unions' use of the fees was for purposes "germane to collective bargaining" *Id.* at 235. The Court reserved ruling on the permissibility of the collection of the dues-equivalent from objecting employees "for purposes not germane to collective bargaining," though it was the clear implication of the decision that such use would be unconstitutional. *Id.* at 238.

Five years later in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court was directly confronted with the question whether a union, acting as the exclusive bargaining representative under an agency contract as authorized under section 2, Eleventh, could constitutionally collect and use the dues-equivalent from an objecting employee in the unit for "political purposes." The result of sustaining this argument would have been a decision rendering the statute unconstitutional. The Court found it unnecessary, though, to consider the constitutionality of the union's collection and use of the dues-equivalent under the statute because it held that it was "not only 'fairly possible' but entirely reasonable" to construe the statute itself in a way making it unnecessary to consider the statute's constitutionality. *Id.* at 750. In adopting this procedure, the Court was merely following a rule often applied and recently restated in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. ——, ——, 80 L.Ed. 2d 428, 439 (1984): "When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." The Court, accordingly, looked to the legislative purpose of section 2, Eleventh. *See United States v. Security Industrial Bank*, 459 U.S. 70, 82 n.12 (1982); *Buckley v. Valeo*, 424 U.S. 1, 79 n.106 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Based

on its finding of the statute's legislative purpose, the Supreme Court held that, under section 2, Eleventh, unions were not vested with "unlimited power to spend exacted money" and they might not use such money to "support candidates for public office" or to "advance political programs" because those were not uses which help "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Street*, 367 U.S. at 768.[21] The Court, however, limited its decisions to the union's "power to use [the dissenting employee's] funds to support political causes which he opposes," saying:

> We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. *Id.* at 769.

This construction of section 2, Eleventh, as stated in *Street*, was restated in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). In that case the Supreme Court said:

> Respondents' amended complaint alleges that sums exacted under the Agreement 'have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs.' *This allegation sufficiently states a cause of action.* It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to

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[21] In *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 436, the Supreme Court said that *Street* held that the RLA "does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked."

which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." *Id.* at 118 (emphasis added).

In *Ellis*, the Supreme Court followed *Street* and *Allen* in their statement of the principle that a statute challenged for unconstitutionality under the First Amendment may be sustained if, as a result of a reasonable narrowing construction consonant with the legislative purpose reflected in the statute, the constitutional objection may be removed or obviated. It found, as had the Court in the earlier cases, that the statute could reasonably be given such construction, and it proceeded to hold that expenditures from the dues-equivalent collected from objecting employees under an agency contract authorized by section 2, Eleventh could embrace expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed *to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.*" —— U.S. at ——, 80 L.Ed.2d at 442 (emphasis added). The Court then went beyond the holdings of its previous decisions, which had limited its interdiction of the use of the dues-equivalent to expenditures for "political activities" or "political expenditures" (*Allen*, 373 U.S. at 118-19), or "for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective-bargaining representative (*Abood*, 431 U.S. at 235, or "for forcing ideological conformity or other action in contravention of the First Amendment" (*Hanson*, 351

U.S. at 238), or "to use [of the employee's] money to support political causes which he opposes" (*Street*, 307 U.S. at 768). Instead, the Court proceeded to identify more specifically certain expenditures which would be permissible and some which would not be permissible under the standards declared by the Court in the construction of section 2, Eleventh. Costs of national conventions, "refreshments for union business meetings and occasional social activities," publications "reporting [to employees] about those activities it can charge them for doing," and "litigation incident to negotiating and administering the contract or to settling grievances and disputes" were said to be permissible charges that could be legitimately made on a proportionate basis against objecting employees but not "organizing" expenditures, which are "outside Congress' authorization." —— U.S. at ——, 80 L.Ed. 2d at 442-445.

In the midst of its decisions construing section 2, Eleventh of the RLA, the Supreme Court dealt in *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), with a state statute which authorized an agency shop under "a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, [was] broadly modeled after federal law." Accordingly, for guidance in construing that state statute "modeled" after section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA, the Supreme Court looked to the decisions in *Hanson* and *Street* under section 2, Eleventh. *Id.* at 225. It observed that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." *Id.* at 225-26. But Michigan law also "permit[ed] union expenditures [by the union under the agency shop agreement] for legislative lobbying and in support of political candidates." *Id.* at 215. The Su-

preme Court invalidated on First Amendment grounds the Michigan statutory authorization for the use of fees collected from an objecting employee for such purposes, saying:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 235-236.[22]

It is defendants' position, though, that the construction of section 2, Eleventh as first stated in *Street* and later reiterated in *Allen* and *Ellis*, is inapplicable in the construction of section 8(a)(3), despite their similarity in language and purpose, and despite the use of those cases, in construing a similar Michigan statute in *Abood*. In its discussion of the statute in *Abood*, the Court likened that statute to section 8(a)(3) and section 2, Eleventh and then said that the Michigan statute was to be construed as those two federal statutes had been construed in *Hanson* and *Street*. It is difficult, therefore, to see the force of an argument that *Street*, *Allen*, and *Ellis* are not as relevant to the construction of section 8(a)(3) as they are to the construction of section 2, Eleventh. If those decisions were relevant to the construction of the statute in *Abood*, they are even more relevant in construing a like federal statute.

And defendants appear to have conceded as much in their formal presentation of their position to the district

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[22] For a full critique of *Abood*, *see generally The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 158-198 (1977).

court in the letter of their counsel. In his letter of June 3, 1977, defendants' counsel advised the district court on the position of defendants thus: "The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees." Moreover, one commentator suggested, even in advance of *Abood:*

> It is unlikely that the first amendment issue raised by political expenditures of forced contributions under the union's security agreements will be resolved in the private sector. The issue under the RLA has been mooted by *Street*, and the NLRA, which governs most other private employers, contains language authorizing union security agreements that is almost identifical to that in the RLA. Since the Supreme Court interpretated the RLA as prohibiting political expenditures, it would be almost certain to place a similar interpretation on that language in the NLRA.[28]

Even Professor Cantor, who is the most public critic of the limited use of union dues under an agency contract, supports this view. In his latest article, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L.Rev. 3, 41 n.219 (1984), he states:

> Although *Street* dealt only with RLA authorizations of a union shop, the NLRA provision contains virtually identical constraints. [citations omitted] RLA § 2 (11), adopted in 1951, was simply intended to confer on rail unions the same union security prerogatives conferred on industrial unions in 1947 in the Taft-Hartley Act. [citations omitted]

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[28] Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 194 (1975).

> Thus, legislative history under both the RLA and the Taft-Hartley Act is relevant to assessing congressional intent in shaping the permissible bounds of union security provisions.

In Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities are "Germane" to Collective Bargaining?* 35 Lab. L.J. 736, 743 (1984), the latest academic comment on the two statutes, the authors said:

> Second, it is apparent that *Ellis* will apply to claims brought under the NLRA. As noted in *Ellis*, Congress's purpose in allowing the union shop was to eliminate the free-rider problem, which arose from exclusive union representation. Congress favored exclusive union representations as a means of promoting labor peace. This notion of exclusive union representation 'underlies the National Labor Relations Act as well as the Railway Labor Act.' For this reason the policies behind the *Ellis* standard are just as applicable under the NLRA. The Ninth Circuit dealt with this issue in *Seay* [*Seay v. McDonnell Douglass Corp.*, 427 F.2d 996, 1003 (9th Cir. 1970)]. In that case the court noted: 'Both the applicable provisions of the Act [RLA] 45 U.S.C. [§ 152, Eleventh —and the applicable provision of the National Labor Relations Act—29 U.S.C. § 158(a)(3)—] are for all purposes here, the same.' It appears, therefore, that the scope of *Ellis* will extend to cases under the NLRA.

We conclude, therefore, that the two statutes, (i.e., section 2, Eleventh and section 8(a)(3) phrased similarly and expressive of the same legislative purpose, should be given the same construction. The defendants appear to argue, though, that the Supreme Court in *Street, Allen,* and *Ellis* in its construction of section 2, Eleventh was so motived by a desire to avoid finding the statute

under review unconstitutional that it gave the statute a skewed or "tortured" construction. They posit that the same "grave" constitutional question perceived by the Supreme Court to exist in connection with the construction of section 2, Eleventh did not exist in connection with the construction of section 8(a)(3). It followed under the defendants' syllogism that, in their view, *Street*, *Allen*, and *Ellis* were not to be given weight in construing section 8(a)(3). We do not find either of the grounds for this syllogism of the defendants valid. First of all, we disagree that the Supreme Court gave section 2, Eleventh an "unreasonable" or skewed construction in order to avoid confronting the constitutional issue. In construing section 2, Eleventh, the Supreme Court in *Street* carefully canvassed the legislative record in order to ascertain the legislative purpose of the statute and, on the basis of that examination of legislative purpose, it reached what in its considered opinion was an "entirely reasonable" construction of the statute. 367 U.S. at 750. In view of the strength of this construction ("entirely reasonable"), we are not prepared to find the construction given section 2, Eleventh by Justice Brennan in *Street* to be "tortured," to use Professor Cantor's term. Cantor, *supra* note 2, at 72. We would be properly hesitant to brand a construction of a statute adopted by the Supreme Court in three cases to be "skewed"; we believe the construction adopted by the Supreme Court was, as that Court said, one which was the "entirely reasonable" construction of the statute based on both its language and its legislative history.

Defendants' second reason, as included in their syllogism, seems to be, however, that the Supreme Court could not be expected to nor would it be impelled to give section 8(a)(3), in an action involving that section, the same construction it had given section 2, Eleventh, in an action involving only that statute, because the Court would not have been confronted with the same "grave"

constitutional question in the case of a challenge to section 8(a)(3) as it was when section 2, Eleventh was challenged. The rationale for this position is said by defendants to be that section 2, Eleventh explicitly pre-empted all contrary state law whereas section 8(a)(3) is inapplicable in any state which has enacted a right-to-work law under section 14(b) of the Taft-Hartley Act.[24] We are unable to see the force of this argument when the question arises in a state such as Maryland which has no right-to-work law and to which section 14(b) has no application. So far as this case is concerned, arising as it does in Maryland, there is no difference between a section 8(a)(3) constitutional challenge and the section 2, Eleventh challenge in *Street*. Section 8(a)(3) is just as effective and all-inclusive so far as employees in Maryland covered by the NLRA are concerned, as section 2, Eleventh is with respect to railway employees employed in Maryland. In fact, the purpose of enacting section 14(b) was to prevent pre-emption of state law in those states which should exercise the right given them by section 14(b) to be exempt from the authorization of section 8(3)(3). *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. at 417. When the employees in Maryland, whether employed on the railroad or in other industrial installations have no rights secured under section 14(b) of the NLRA and are subject to practically identical statutory restrictions and limitations under section 8(a)(3) and section 2, Eleventh, it seems inconceivable that the Supreme Court would, in construing the two statutes, offer protection to one group of such employees and deny it to others because of some action taken by another state in enacting a statute under section 14(b) to protect only that latter state's employees. Actually, it is interesting that in *Abood*, where the Supreme Court faced the constitutionality of the agency shop clause directly, because the Michigan statute ad-

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[24] 29 U.S.C. § 164(b) (1983).

dressed public employees, it adopted the very construction of section 2, Eleventh declared by it in *Street* as the limit of constitutional power in permitting the exaction of the dues-equivalent from an objecting employee under an agency contract executed by an exclusive bargaining representative under the authority of a state or federal statute. This, it seems to us, demonstrates that it matters not under what statute the claim arises, for the result is the same.

Defendants also seek to cite other differences between section 2, Eleventh and section 8(a)(3) which render it improper to construe the two statutes similarly. The first of these differences is that prior to the enactment of section 2, Eleventh, the RLA prohibited the union shop whereas section 8(a)(3) of the NLRA permitted the union shop prior to the amendment made to that section in 1947 by the Taft-Hartley Act. It escapes us how the language of the two Acts prior to the additions of the provisions in question could effect the construction to be given the later amendments, expressed in similar language and intended to effectuate the same legislative purpose. Next, defendants find substantial differences because section 2, Eleventh allows union shop charges "for periodic dues, initiation fees, and assessments" and section 8(a)(3) uses the language "periodic dues and the initiation fees." When we consider the definition which the Supreme Court gave the term "assessment" in section 2, Eleventh of the Railway Labor Act, we perceive no reason to make any distinction between the two Acts so far as the issue involved in this case is concerned. Thus, in *Hanson*, the Court clearly stated that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining," they would be subject to the same restraints on use as would "dues." 351 U.S. at 235. In short, "assessments" add nothing to "dues" so far as an ability of the union to use either for "purposes not germane to collective bargaining." Fi-

nally, defendants find some significance in the fact that, during the development of section 8(a)(3), there was some discussion of placing a limit on "dues" or "initiation fees," but Congress determined ultimately not to do so, whereas in the later adoption of section 2, Eleventh the legislative history is silent on this point. The fact that in the legislative history of the earlier statute (section 8(a)(3)) there had been discussion of placing a dues limit in the statute, but Congress ultimately determined not to include or limit, whereas Congress, during the discussion preceding the later enactment of section 2, Eleventh never mentioned the subject of a limit on dues but followed the earlier statute in omitting such a limit, lacks any logical meaning to us. The addition of a specific limit on "dues" in the statute had been resolved when section 8(a)(3) was adopted. Unless Congress wished to depart from its view as adopted in 1947 in the consideration of section 8(a)(3), there was no point in reopening the matter when later Congress was considering enacting a similar statute for railway workers in section 2, Eleventh.

As their final thrust at the statutory claim of plaintiffs, defendants assert that plaintiffs' action, if sustainable, is within the exclusive jurisdiction of the National Labor Relations Board and that plaintiffs are without any justiciable remedy for the redress of this violation of their rights. Defendants conceded in their affidavits and motions, however, that a portion of the dues collected from plaintiffs by them was and will be used to finance political activities. The conscious use of such funds by the unions on their authority as the exclusive bargaining representative under the agency contract negotiated by them with the employer is not only a violation of the statute itself but also a violation of defendants' duty of fair representation. In either case, the action would have been within the jurisdiction of the district court under 28 U.S.C. § 1337. In *Street*, the Supreme Court made it

clear that under the federal labor law "a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." 367 U.S. at 761. And this duty has been interpreted "to require a union to represent fairly all the members of the bargaining unit for which the union is the exclusive agent, and this obligation in turn has been interpreted to include a specific duty to the unit's nonunion employees to establish procedures that will make sure that the employees are not forced to pay for union activities other than those the union undertakes in its agency role." *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984).

Specifically, courts have held that the union, under its role of exclusive bargaining representative by virtue of the agency contract, violates this duty of fair representation by compelling payments of dues to be used for purposes "not germane to collective bargaining" unless the unions have established a rebate procedure that fully protects the nonassenting employees from illegal exactions. That defendants in this case have not established a rebate procedure that "adequately protected the nonmembers' right to avoid contributing to objectionable political purposes" is established by *Ellis. Champion v. California*, 738 F.2d 1082, 1086 (9th Cir. 1984), *cert. denied sub nom. Champion v. Deukmejian*, —— U.S. ——, 84 L.Ed.2d 367 (1985) (decided on the basis of *Ellis*). Under those circumstances, an action for violation of the duty of fair representation is not pre-empted by the National Labor Relations Act, for, as the Supreme Court said in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971):

> Indeed, in *Vaca v. Sipes*, 386 U.S. 171 (1967), we held that an action seeking damages for injury

> inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.

This same thought was expressed in *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 746 (5th Cir. 1974):

> In our judgment, union conduct may be consistent with or even unrelated to the terms of a collective bargaining agreement and yet violative of the duty of fair representation.

Such was the ruling in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), and *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-12 (10th Cir. 1971).[25]

Jurisdiction over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337. Section 1337 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce." The Supreme Court has held that the NLRA is an Act of Congress regulating commerce, *see Capital Services, Inc. v. NLRB*, 347 U.S. 501, 504 (1954), and a suit for the protection of rights protected by section 8(a)(3) and under the union's duty of fair representation is one arising under the NLRA, *see William E. Arnold Co. v. Car-*

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[25] On remand, the court in *Reid* found that the union had given proper protection by its rebate provision and therefore held that the union had not violated its duty of fair representation. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir. 1973). The correctness of this decision must be doubtful after *Ellis* in which the Supreme Court disapproved a similar rebate procedure.

penters District Council, 417 U.S. 12, 16 (1974); *NLRB v. Heyman*, 541 F.2d 796, 799 (9th Cir. 1976); *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 576 (8th Cir. 1981); *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 748-749 (5th Cir. 1974); *Nedd v. United Mine Workers*, 400 F.2d 103, 106 (3rd Cir. 1968). *See also Storey v. Local 327, International Board of Teamsters*, No. 83-5747, slip op. at 11-13 (6th Cir. Mar. 29, 1985). In the case *sub judice*, plaintiffs pled jurisdiction under section 1337 and challenged CWA's expenditures both under section 8(a)(3) as construed by the Supreme Court and as violative of its duty of fair representation. Consequently, the district court properly exercised jurisdiction over this matter.[26] In addition, were this not so, it is difficult to find jurisdiction in *Ellis*, which was filed initially in the federal district court, just as this case. That case was exactly like this case, save that it was brought under section 2, Eleventh and this one under section 8(a)(3). But, as we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2, Eleventh in *Ellis* (and that could be the only basis for jurisdiction in *Ellis* since the Supreme Court found it unnecessary to consider the constitutional claim), by the same token there is jurisdiction over the statutory claim

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[26] Because jurisdiction was properly invoked under § 1337, we need not decide whether jurisdiction exists under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. However, in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), it was said that jurisdiction could be sustained under § 185 if the facts alleged or proved brought the action within the section. The undisputed facts in this case meet that test. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980) ("'If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded'") (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)); *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

under section 8(a)(3) here. In short, jurisdiction can only be denied in this case if jurisdiction is to be denied in *Ellis*.

Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C.Cir. 1983), has been cited as contrary to jurisdiction in this case. *Kolinske*, on its facts, may well be said not to raise an issue within the union's duty of fair representation or violative of section 8(a)(3). The question there involved was the appellee's eligibility to receive strike benefits during a strike. These benefits were not created under the agency contract with the employer; neither did they have statutory authorization; they "were developed by the union *solely* as an ancillary, supportive tool of collective bargaining"; they by the terms of their creation "were made available to any employee, whether member or non-member, who contributed to the fund and in some way manifested a willingness to help the union's collective bargaining activities" (in this case the strike); and "[e]ligibility for benefits was conditioned in many ways, and payment was based on family size and length of a strike." *Id.* at 482 (emphasis added). The appellee's claim in that case related to the union's rules of eligibility for benefits from a union-developed and union-created fund. Such a case is one entirely involving union internal policies. In this case, however, the union's rights and obligations arise out of an agency contract authorized under a federal statute. Under that federally authorized contract, the union derives its right to collect a service charge from objecting employees. The rights of the union thus derive from an agreement, the content of which—so far as the collection of the dues-equivalent—is controlled by federal law as described by the Supreme Court. The source of the union's authority in this case is not certain rules developed and set by the internal procedures of the union; its right to the service charge and its obligation in the use of the dues-equivalent collected for that purpose stem from an agency contract

that exists only by virtue of federal law. A violation by the union of its duties under such contract, is a clear breach of section 8(a)(3) and of the union's duty of fair representation, intended to protect against discriminatory or arbitrary action by the union.

Since we are satisfied that there is jurisdiction of the statutory action under section 1337 on the authority of *Street*, *Allen*, and *Ellis*, it would seem unnecessary for us to consider the constitutional basis for jurisdiction. Lest it be thought that we agree with defendants' contention that there is no such basis for jurisdiction in this case, we address briefly that issue. We add that we are convinced that there is governmental action sufficient to sustain jurisdiction. The Supreme Court found jurisdiction of the constitutional right of action under section 2, Eleventh in *Hanson*, which involved "private employment" as does this case. 351 U.S. at 232. Further, the constitutional claim dealt with a statute which, as we have seen, was similar in language and legislative purpose to section 8(a)(3). As *Abood* emphasizes, "the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. If we assume that section 2, Eleventh and section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is governmental action here sufficient to satisfy the requirements for governmental action.[27] And defendants apparently recognize this, for they have argued at some length, as we have seen, that there is a substantive difference in the two statutes.

As we have said, no difference in the two statutes can be found either in their language or in their proclaimed legislative purpose. Defendants, however, purport to find

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[27] *See Blair, supra* note 23, at 194.

a difference in the fact that section 14(b) of the NLRA applies to exclusive representation cases under the NLRA, and not to such cases arising under the RLA. As we have said earlier, section 14(b) provides that section 8(a)(3) in its authorization of the agency shop will not apply in cases arising in a state which has banned agency shops. There is no similar provision in the RLA, for section 2, Eleventh states explicitly that it supersedes any state law. Repeating what we said earlier: we are unable to find that this difference has any relevance in the caes before us. This action arises in Maryland, a State which has no right-to-work statute. So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA. Section 14(b) applies in neither of those cases; the controlling law in both cases is the federal statute. The court in *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.) *cert. denied*, 404 U.S. 872 (1971), put the matter accurately: "By section 14(b)'s necessary implication, federal approval, and hence federal enforcement [under section 8(a)(3)] will exist in those states that do not enact such a law."

Defendants purport to find some substance for their argument in what they declare is the permissiveness in section 2(a)(3). Whether there is an authorized agency shop under section 8(a)(3) in any state depends, they argue, upon the will of the state, which, by enacting a section 14(b) statute, can prevent the execution of a valid agency contract over employment in the state. Governmental action which can exist only by the permission of the state will not do, they declare. Defendants overlook that an agency contract, whether under section 2, Eleventh or under section 8(a)(3), is by definition permissive. It depends on the agreement of both the employer and the bargaining agent; unless both give their permission, there can be no agency contract under either statute. This is the reason Justice Douglas in *Hanson*

said: "The union shop provision of the Railway Labor Act is only permissive." 351 U.S. at 231. Of course, there is no federal jurisdiction until the employer and the union choose to invoke the authorization granted under section 8(a)(3). To that point their rights may be termed "permissive." But when they actually invoke section 8(a)(3) and execute an agreement under the statute, the obligations cease to be "permissive" and become compelled under the statute.

Abood is also supportive of governmental action. It arose out of a state statute, applicable to state employees, which was similar in language to both section 8(a)(3) and section 2, Eleventh, except in one particular: it allowed the union enjoying the rights under an agency contract to collect dues which could be used for lobbying or political purposes. That statute had been enacted because states are exempt from the NLRA's provisions, just as states enacting right-to-work statutes are exempt. *See* 29 U.S.C. § 152(2). Certain state employees assailed the constitutionality of the provision allowing the use of their "dues" for political or lobbying purposes. The state trial court sustained the statute, finding the clause permitting use of the exacted funds did "not violate the Federal Constitution." 451 U.S. at 215. On appeal of the state intermediate appellate court's decision reversing and remanding the trial court, the Supreme Court reversed. The Court began by stating: "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests . . . [and may] well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. The Court found, however, that, because of "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," a "service charge" may be collected to such extent as it is

used to finance "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" but not for political or lobbying purposes. *Id.* at 222, 225-226. It then addressed the question whether there is a difference between public and private employees in this area and dismissd the claim with this significant statement: "The differences between public and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. It reiterated its construction of *Hanson*, as already quoted, to the effect that the union shop agreement authorized by the RLA was "found to result from governmental action." *Id.* at 226.

Governmental involvement and governmental action in this case, as *Abood* makes clear, is indisputable. The right of action herein has its roots in the national labor policy embodied in the NLRA and the Taft-Hartley Act and is a part of that legislated national labor policy, that, according to the opinion of the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967),

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all the employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

That power of a union to exercise this compelling power as the exclusive bargaining representative of employees —both those approving and those objecting—in the unit stems from federal law. It is, as Justice Douglas said in *Hanson*, when referring to section 2, Eleventh, the "federal statute [which] is the source of the power and authority by which any private rights [of an objecting

employee] are lost or sacrificed. [citation omitted] The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 232. And, in *Ellis*, the Supreme Court reiterated this same point. It said:

> Only a union that is certified [under federal law] as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make a contribution to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by § 2, Eleventh terminate if the union ceases to be the exclusive bargaining agent. —— U.S. at ——, 80 L.Ed. 2d at 442.[28]

Again, as the Court in *Hanson* said, the "sanction of government" is "put behind" an agency contract, whether under section 2, Eleventh or under section 8(a)(3), executed by the exclusive bargaining agent. 351 U.S. at 232 n.4. Justice Douglas, who had written the opinion in

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[28] Since oral argument, counsel for defendants have cited to us *Price v. International Union*, No. H-84-1221, (D. Conn. Apr. 11, 1985). That case is similar to the one under review here. In *Price* the Court found that there was no "governmental action". Its rationale for this conclusion was:

> The union security clause contained in the contract among the defendants here is part of a privately bargained contract among private parties. That clause would be permissible if both state and federal law were silent about such clauses, and the existence of a permissive, but not compulsory federal statute which may be preempted by contrary state law does not establish that the federal government is the source of authority for the clause. Slip op. at 12-13.

This reasoning contradicts the holding in *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 442, quoted above in the text (p. 47).

Hanson, made this point more emphatic in his dissent from the denial of certiorari, in which Chief Justice Burger concurred, in *Buckley v. American Federation of Television and Radio Artists*, 419 U.S. 1093, 1095 (1974):

> When Congress authorizes an employer and a union to enter into union-shop agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it has imposed them by statute.

If we were to follow the defendants' reasoning, what the government has done by authorizing the agency shop in section 2, Eleventh and section 8(a)(3) and compelling either union membership or the dues-equivalent contribution as a condition of employment is to vest the union with the right and authority to collect dues to be used for, among other purposes, the support of political candidates, policies, and political ideologies without any right existing in non-consenting employees to a judicial forum for the protection of their First Amendment rights or their rights under section 8(a)(3). Such authority as the union has in this case is grounded directly on the power given it as a result of its status as bargaining representative under the federal statute and under an agency contract that in turn owes its status to another federal statute. When that power—power to collect against the employee's will—to collect the dues-equivalent and to use those funds in a completely unconstitutional way (i.e., for political and lobbying purposes) is exercised by the union entirely under federal authorization, it seems impossible not to find in such union action governmental action. It is true, the actor is the union, but the union acts only under the warrant of federal authority. The union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government. As Jus-

tice Douglas said in his concurring opinion in *Street*: "Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them." 367 U.S. at 777. There is, in our opinion, governmental action.

In this case, the two-part test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) is fully satisfied. Unquestionably the deprivation in this case is "caused by the exercise of some right or privilege created by the State" and, since the statute clothes the union with the authority to exercise that power, the "conduct [of the union] is otherwise chargeable to the State." *Id.* at 937.

Defendants seek to find support for their contrary view in the recent cases of *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *Blum* and *Rendell-Baker* both involved conduct by defendants which was clearly private. *Blum* involved a nursing home which was expected to meet certain regulatory requirements, but the transfer of patients, which was the subject of that action, was not within the regulations. In finding an absence of state action, the Court said: "[a] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004. That language delineates perfectly the difference between this case and *Blum*.

Rendell-Baker involved the discharge of a teacher by a private school receiving its support largely from public funds. However, it was expressly agreed between the public bodies and the school that the latter was private and its employees were not "city employees." 457 U.S. at 833. The decision to discharge the plaintiff was "not compelled or even influenced by any state regulation."

Id. at 841. That is again quite different from this case where all acts taken were compelled by federal statute.

Defendants also cite *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). In *Sadlowski*, the Supreme Court found the challenged conduct valid. In *Weber*, the employer and the union added to their collective bargaining agreement an affirmative action plan. Such addition was purely voluntary, based on no statutory or regulatory authorization. As the Court remarked, such a plan did not involve state action. 443 U.S. at 200. Neither of these cases adds any force to defendants' objection to our finding of governmental action and thus jurisdiction over the plaintiffs' clearly established constitutional claim. It follows that, in our opinion, governmental action [29] and thus jurisdiction would exist in this case over plaintiffs' constitutional claim.

Satisfied that there is jurisdiction present on both the statutory and constitutional claims of plaintiffs, we turn to the defendants' second claim of error in the decision of the district court.

The only remaining issue in this case is directed at determining what expenditures made by the union out of the dues-equivalent collected under an agency contract executed pursuant to section 8(a)(3) were permissible against objecting non-union employees such as plaintiffs.

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[29] *Compare Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), *Havas v. Communications Workers*, 509 F.Supp. 144, 148-149 (N.D.N.Y. 1981), and *Lykins v. Aluminum Workers Int'l Union*, 510 F.Supp. 21, 24-26 (E.D. Pa. 1980), *with Kolinske v. Lubbers*, 712 F.2d 471, 474-480 (D.C. Cir. 1983), *Hovan v. United Bd. of Carpenters and Joiners*, 704 F.2d 641, 642-645 (1st Cir. 1983), *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-411 (10th Cir. 1971), *further proceedings*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973), *and Price v. International Union*, No. H-84-1221, slip op. at 12-13 (D. Conn. Apr. 11, 1985).

The standard to be used in such determination was recently set forth by the Supreme Court in *Ellis*, by drawing upon and expanding upon the earlier decisions in *Street*, *Allen*, and *Abood*. *Ellis* said that objecting employees such as plaintiffs, from whom dues are collected and used under the agency contract, can only be charged for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive reprensentative of the employees in dealing with the employer on labor-management issues." —— U.S. at ——, 80 L.Ed.2d at 442. Under this standard, the objecting employees "may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.* The objecting employees are entitled to a refund of any amount collected of them by the union beyond these "costs."

The burden of proof in establishing the charges validly chargeable under this standard against the objecting employees rests on defendant unions. This was settled by *Allen*, in which the Supreme Court said:

> Since the unions posses the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. 373 U.S. at 122.

It is at this point in the analysis that the error claimed by defendants emerges. In determining whether the un-

ions met their burden, the special master applied the clear and convincing standard of proof, though the special master modified this somewhat by the language in *Allen* that absolute precision was neither expected nor required. Even as modified, though, this standard of proof conflicts with the standard set forth in *Ellis*, which is that of preponderance of the evidence. —— U.S. at —— n.15, 80 L.Ed.2d at 447 n.15.

Defendants' specific claim of error is that the special master used the improper standard of proof and that the district judge affirmed such use. It is clear that the special master erred in his standard of proof. However, it does not follow that all the conclusions of the special master, as affirmed by the district judge, must be vacated. Defendants identify no findings made by the special master and confirmed by the district judge which were made on the basis of this standard; they apparently would presume, however, nothing else appearing, that any finding of disputed fact was tainted by error due to the application of the incorrect standard. But, even accepting defendants' argument, it means that only those conclusions in which there was a dispute in the evidence are vulnerable to attack on the ground that the special master had weighed and resolved the facts by the use of an incorrect standard of proof. If the conclusion of the special master was one of law and required no evaluation of conflicts in evidence or if it was based on an absence of *any* evidence, the error in application of the incorrect standard of proof could not be said to have influenced the decision and would thus be harmless. Our problem, therefore, is to ascertain the findings or conclusions of the special master as confirmed by the district judge which may have been affected or influenced by the application of the incorrect standard of proof.

In doing this, however, we must recognize that there are two sets of defendants; one, CWA, the national union, and the other, the locals. The fee collected from

the employees under the agency contract was divided between the two on a 40-60% basis, respectively. The national and the local unions have made separate presentations and we must, therefore, deal separately with the expenditures of CWA and the locals. We shall begin with CWA's proof of expenditures.

CWA, through its expert witness, a certified public account, reviewed the expenditures made by CWA for the years in question and classified them under eight headings. The special master accepted the witness' listing of expenditures and the classifications within which he grouped these expenditures. He found no occasion in dealing with four of these classifications to inquire into the accuracy of the charges or the propriety of the classification. He did this because he found these groups to include charges impermissible against plaintiffs as a matter of law. He gave specific reasons in each instance for this disallowance. None of these reasons, we emphasize, represented a resolution of disputed facts but instead represented a determination that as a matter of law the expenditures were not chargeable to plaintiffs. We consider each of these disallowed categories of expenditures:

> (1) The first of these disallowed expenditures were those CWA itself classified as "political." It seems that CWA concedes the propriety of this disallowance. Had defendants not conceded the inadmissibility of these expenditures as charges against plaintiffs, *Street* would have compelled their disallowance.[30]

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[30] Professor Cantor has suggested that Congress in the Taft-Hartley Act banned the use of union fees in federal elections. Cantor *supra* note 2 at 72-76, 49 Notre Dame L. Rev. He argues that Congress thereby manifested its awareness of the problem and the fact that it did not include a similar prohibition in § 8(a)(3) of the Act indicates an intention by Congress not to prohibit such use in connection with that section. To sustain any

(2) The second category of expenditures found by the special master to be impermissible were "labor legislation" expenditures. This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of "lobbying efforts" by CWA "far remote . . . from collective bargaining, contract negotiation and grievance adjustment," for instance, "lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment." He suggested that there might have been some areas such as "the Telecommunications Act or Occupational Health and Safety Regulations" where "lobbying" would have some relevance, but the special master said CWA had made no effort to identify any such permissible "lobbying activities" or to offer any evidence in support. The disallowance seems justified under *Abood*.[31]

(3) "Community services" expenditures were also found inadmissible charges as a matter of law. In reaching that conclusion, the special master held that such expenditures did "not directly relate to, and are not reasonably necessary, in the opinion of the Special Master, for the proper effectuation of collective bargaining, contract administration and grievance adjustment." He added that First Amendment rights were involved in this situation because employees "may not approve of the particular charities

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such theory would be to reverse the decisions in *Street, Allen,* and *Abood.* We refuse the suggestion and choose to abide by the decision which the Supreme Court has reached in those cases dealing with § 2, Eleventh of the RLA which is similar to § 8(a)(3).

[31] In *Robinson v. New Jersey,* 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. It is not easy to reconcile this decision with *Abood.* However, we are not here concerned with public employees and the unique considerations which influenced the decision in *Robinson* are not present here.

receiving the largess of the Union" and the employees "may well have their own favorite charities . . . to which they may wish to contribute the portion of their agency fee payments allocated by the Union to charitable contributions." The disallowance seems to accord with the test stated in *Ellis*.[32]

(4) Finally, the special master disallowed what CWA identified as expenditures for "organizing." Incidentally, this is the only specifically disallowed class of expenditures which CWA claimed to be erroneous in its exceptions to the special master's report. However, *Ellis* held that such expenditures were not allowable charges against the objecting employees because "such expenditures are outside Congress' authorization." —— U.S. at ——, 80 L.Ed.2d at 444. The Supreme Court gave a number of reasons supporting their decision. These began with the statement of the legislative purpose of the enabling legislation: "We remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the costs thereof." *Id.* at ——, 80 L.Ed.2d at 441-442. The Court concluded with this comment: "Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any freerider problem here . . . is a far cry from the free-rider problem with which

[32] The only justification offered by CWA before the special master for the allowance of these expenditures as charges against plaintiffs was that such expenditures "creat[ed] a favorable climate of public sympathy and support when collective bargaining time arrives and particularly when there is a strike." We agree with the special master and the district judge that, under the test stated in *Ellis*, such expenditures were not "reasonably necessary . . . for the proper effectuation" of collective bargaining.

Congress was concerned." *Id.* at ——, 80 L.Ed.2d at 445.

The error in the standard of proof had no connection with the findings and conclusions on the chargeability of expenditures in these four categories and cannot provide a justification for a reversal. We therefore affirm the decision of the district court in approving the special master's disallowance of CWA's expenditures under the following four classifications made by defendants' accountant: "political," "labor legislation," "community services," and "organizing." There were four other classifications of expenditures identified by CWA's expert. One of these, headed "administrative," was a catch-all, spread out over the other seven classifications on a proportionate basis, and appears to create no problem. The other classifications in the grouping of expenditures were disbursements for "collective bargaining," "grievances," and "contract administration" purposes. The expenditures in these areas were also listed and identified as to their particular purpose by CWA. Some items of expenditures included in these areas were disallowed by the special master. Thus, he disallowed all expenditures listed under the heading of "Foreign Affairs." CWA had other expenditures identified for the purpose of "Defense Funds." Included in such expenditures was a substantial contribution to the United Mine Workers in support of their strike. This expenditure was disallowed by the special master. CWA had a grouping of expenditures in an area titled by it as "Publicity and Public Relations," which the president of CWA, according to the special master, classified as "Organizing." On that basis the special master disallowed the expenditures under this grouping. We agree with the special master's rulings on these disallowed items, as approved by the district judge. Their disallowance was made on the ground that such expenditures did not qualify for allowance under the rule as enunciated by the Supreme Court in *Ellis*. Such deci-

sions by the special master could not have involved in any way the erroneous standard for evaluating disputed questions of fact and are affirmed.

The other expenditures listed under the broad classifications of "collective bargaining," "grievance," and "contract administration," included various items such as "Convention and Related Committees," "Development and Research," "Professional Fees," and "Education." The differences between the special master and CWA did not concern the propriety of the titles. Unlike the situation in connection with the four classifications first discussed, where the items were disallowed as not admissible charges as a matter of law, it seemed that expenditures under these headings were reviewed on their facts. Most of these expenditures consisted of personal services. CWA's auditor relied in his compilation of these cost items on the estimate given him in interviews by the employees involved. CWA also called as witnesses some of the individuals involved to substantiate the charges. These witnesses confirmed the estimates of their time devoted to collective bargaining matters of the units involved here as shown on the auditor's figures. On cross-examination, however, these witnesses described their allocations of time to such duties as merely "guesses" and these witnesses were less than firm in their testimony. Moreover, CWA's accountant likened the problem of making a proper allocation of the employees' work time devoted to collective bargaining, grievance, and contract administration as difficult as "making a frog fly." He was unwilling to certify the charges. There were quite a number of employees, whose time was in whole or in part charged to collective bargaining, who were never called and gave no testimony on the expenditures listed covering the time they devoted to such collective bargaining. Because of the showing made by CWA, these charges were largely disallowed by the special master. On the record before us, it is not possible to determine whether the special master, in reaching this conclusion, applied a

"clear and convincing" standard of proof. For that reason, the allocation as it relates to these three classifications ("collective bargaining", "grievance," and "contract administration"), except for those items included therein specially found by us earlier to be improper charges ("Foreign Affairs," "Publicity and Public Affairs," and a part of the "Defense Fund") must be remanded to the district court.

On remand, we would assume the district judge will recommit the cause to the special master. It is to be hoped, however, that it will not be necessary on remand to take any extensive evidence. After all, the relevant evidence is already in the record. The problem is one of weighing the evidence by the proper standard of proof. It should be possible for this to be done promptly based largely, if not entirely, on the testimony already taken and without any great delay. This case has been pending for six years; it is time for it to be concluded. The parties' legal rights have been settled and the amount of monetary judgment is not large. The parties should cooperate to expedite the further resolution of this action.

Our discussion has so far dealt with the liability of CWA itself. It remains to confront the same issues as they relate to the local unions. Here the problem is the dearth of any reliable record of expenditures. In the opinion of the special master, the records of but one local union were sufficiently complete to give any reliable picture of the local's expenditures and this was for only one year. The special master accepted the records of this one local as typical of all the locals. The special master said he was unable to identify more than two percent of the local's expenditures which would have been admissible charges against plaintiffs. The other expenditures appeared to him to be inadmissible, but, even if the local was given the benefit of every doubt, it would be impossible, in his opinion, to regard as permissible charges against plaintiffs any more than the amount of

permissible expenditures allowable in favor of CWA (i.e. nineteen percent).

Obviously, the special master was not using a "clear and convincing" standard of proof in weighing the testimony on expenditures by the local unions. The problem, however, is that the special master reached his conclusion basically on his findings made in connection with CWA's expenditures, and, since we have remanded for further review on those findings, it would seem to follow that we must, under the same terms, remand the issue of the liability of the local unions.

We now turn to plaintiffs' objections. Their first contention on appeal is that the permanent injunction granted by the district court is statutorily inadequate. The injunction allows CWA to charge plaintiffs the full amount of regular member dues subject to reduction by an amount an independent certified public accountant later determines to be non-retainable. The injunction also makes provision for an interest-bearing escrow account which shall contain twice the amount determined in the previous fiscal year to be non-retainable. Plaintiffs contend the injunction permits CWA to use their agency fees for improper purposes, contrary to the holding in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. at ——, 80 L.Ed.2d at 438-439. On the contrary, the permanent injunction here at issue complies with the mandate of *Ellis*. In *Ellis*, the Supreme Court stated that a pure rebate approach, which permits a union to collect from agency fee payors full union dues subject only to later reduction, is statutorily inadequate because:

> [T]he union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance re-

> duction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

Id. at ——, 80 L.Ed.2d at 439. While striking down the pure rebate approach, the Court explicitly approved of an approach incorporating an interest-bearing escrow account, similar to the injunction formulated by the district court in the case *sub judice*. Under the injunction prescribed by the district court, CWA will be unable to "commit dissenters' funds to improper uses even temporarily" because the escrow account is not subject to CWA control. Consequently, the permanent injunction prescribed by the district court adequately protects plaintiffs' rights because CWA will derive no benefit from the amount determined to be nonretainable.[33] *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1197 (7th Cir. 1984).

Plaintiffs also contend that the permanent injunction is inadequate because it provides that only if an agency fee payor is successful in challenging the amount determined by an accountant to be non-retainable will the cost of the challenge be taxed to CWA. Plaintiffs contend that CWA should bear the cost of *any* challenge made to the amount determined to be non-retainable. In this respect, plaintiffs simply ask for too much. They have been granted an injunction prohibiting CWA from collecting amounts unrelated to CWA's duty to represent the em-

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[33] Plaintiffs further contend that only an advance reduction approach can adequately protect their statutory rights. This contention, however, is without merit, for the Supreme Court in *Ellis* expressly sanctioned either an advance reduction *or* an interest-bearing escrow account approach. Either approach is adequate, because each prevents a union from extracting a forced loan from non-consenting payors.

ployees in labor-management relations and it is clear that CWA will not benefit from amounts determined to be non-retainable. To burden CWA with the cost of any challenge to the non-retainable amount, however frivolous, would not only encourage meritless challenges but also unfairly burden the union's other dues-paying members. Plaintiffs' rights are adequately protected by reimbursement for the cost of a successful challenge to the non-retainable amount.

The judgment of the district court is accordingly

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WINTER, Chief Judge, dissenting:

I dissent. Plaintiffs contend that use of their agency shop fees for purposes not directly related to collective bargaining, grievance adjustment, or contract administration violates both the first amendment and § 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a). I conclude that the statutory claim fails because § 8(a)(3) cannot fairly be read to impose such limits on a union's use of the fees its collects. I further conclude that the first amendment claim fails because the defendant unions' use of plaintiffs' fees does not constitute state action. I would therefore reverse and direct entry of judgment for the defendants based on plaintiffs' failure to state a claim upon which relief can be granted.

I. Statutory Claim

Plaintiffs argue that the unions' use of their agency shop fees violates an implied right under § 8(a)(3) of the NLRA "not to be required to pay money, over objection, for [the union's] expenses not directly related to collective bargaining, contract administration and griev-

ance processing." Brief for Appellee at 32. This construction of the statute finds no support in the express language of the statute. Section 8(a)(3) is part of the subsection listing employers' unfair labor practices;[1] plaintiffs read into the provision a limit on *unions*, the violation of which is *not* an unfair labor practice.[2] Nor

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[1] Subsection 8(a), as codified at 29 U.S.C. § 158(a), provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
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> . . .
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

Actions constituting "an unfair labor practice for a labor organization" are listed in subsection 8(b).

[2] If plaintiffs simply raised this § 8(a)(3) claim as an unfair labor practice then the National Labor Relations Board would have exclusive jurisdiction. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Plaintiffs have instead characterized the alleged violation of § 8(a)(3) for jurisdictional purposes as both a "Breach of Implied Conditions of Contract and Statute" and a breach of the statutory duty of fair representa-

does this construction find any explicit support in legislative comment on the meaning of the subsection. Plaintiffs nevertheless argue that their construction of § 8(a)(3) has the virtue of letting us avoid the state action question presented here. Before reaching a difficult constitutional question, they note, we must first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. International Association of Machinists v. Street, 367 U.S. 740, 749 (1961).

I conclude that plaintiffs' proposed interpretation of § 8(a)(3) is not *fairly* possible, and that plaintiffs therefore have no statutory claim. Both the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA.[3] Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3).

Congress enacted § 8(a)(3) as part of the National Labor Relations Act of 1935, 29 U.S.C. § 141 *et seq.* That Act permitted closed shop agreements—those requiring union membership as a precondition to employment—unless such agreements were prohibited by state law. *See* Colgate-Palmolive-Peet Co. v. National Labor Relations Board, 338 U.S. 355, 361 (1949). The Labor

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tion. Complaint at 18; Appellees' Supplemental Brief at 2-4. *See also* majority opinion, *ante* at 37-42. The proper interpretation of the NLRA, as shown *infra*, defeats plaintiffs' statutory claim, however stated; Congress simply did not intend to allow the external review of union expenditures that plaintiffs seek. *Cf.* Price v. International Union, U.A.W., No. H-84-1221, slip op. 15-18 (D. Conn. April 11, 1985) (complaint about union's use of agency shop fees would not support duty of fair representation claim).

[3] *See also* Cantor, Uses and Abuses of the Agency Shop, 49 Notre Dame L. Rev. 61, 72 ff. (1983).

Management Relations Act of 1947 (the Taft-Hartley Act) amended § 8(a)(3) to prohibit the closed shop. Section 8(a)(3), however, continued to permit agency shop agreements—those requiring all employees to pay the equivalent of dues—unless prohibited by state law.

In enacting the Taft-Hartley Act, Congress explicitly considered the union practice of spending dues and fees for various purposes not directly related to collective bargaining. One of the prominent witnesses at the congressional committee hearings, the movie director Cecil B. DeMille, testified on this issue, using the example of his own experiences:

> In my case the right of political freedom was invaded [by the union] when I was given the choice between working or paying a political assessment . . . Because I refused to pay a political assessment, I was deprived of the right to work.

Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 801, 797 (1947), *cited in* S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947). DeMille objected strenuously to such exactions. He suggested that permitting agancy show agreements would be sufficient to solve the "free rider" problem of employees benefiting from union activity without contributing to its cost. Such a provision, he urged, should "provide that the service charge must be fair and not excessive." He further urged that "[p]olitical assessments and improper levies should be absolutely banned in any case." *Id.* at 806.

Congress acknowledged the problem of the worker who "has been compelled to contribute to causes and candidates for public office to which he was opposed." H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947) ("House Report"). To remedy this problem the initial House bill proposed two solutions. First, the bill declared that "[m]embers of any labor organization shall have the

right to be free from *unreasonable* or discriminatory financial demands of such organization." H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947) (emphasis added). To implement this policy, the bill made it an unfair labor practice for a union

> to impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiation fees greater than that amount are reasonable under the circumstances; or to impose any dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such *reasonable* amounts as the members thereof, whom such organization represents or seeks to represent as a representative under section 9, by a majority of those voting, after due notice to the membership, shall authorize . . .

H.R. 3020, 80th Cong., 1st Sess. § 8(c)(2) (1947) (emphasis added). The House Report suggested that "[w]hat is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors." House Report at 31.

Second, the bill amended the Federal Corrupt Practices Act to make it unlawful for a union "to make a contribution or expenditure in connection with" any political election, primary or political convention to select candidates. H.R. 3020, 80th Cong., 1st Sess. § 304(1947). This provision meant that unions could use direct contributions for election activities, but only if "the dues which [employees] pay into the union treasury are not used for such purpose." 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft), *quoted in* United States v. CIO, 335 U.S. 106, 119 (1948).

The House bill's attempt to monitor the "reasonableness" of union fees was part of a general proposal to

enact a "bill of rights" to limit union power. *See* 93 Cong. Rec. 3581 (statement of Rep. MacKinnon). This proposal met with extensive criticism. The House Minority Report faulted the bill's attempt to subject unions "to an external control of purely internal functions which is without parallel when compared to any other form of voluntary association." The report noted in particular the "extreme restriction of the internal activities of the union" imposed by such provisions as "the regulation of initiation fees and dues." These restrictions, the Minority Report asserted, would be both unfair to unions and unworkable in practice:

> These regulatory measures are not an appropriate subject for Federal legislation. Attempts by the Board to secure these rights for employees and union members and to regulate these activities would be attempting the impossible, i.e., attempting a regulation of the infinite details involved in the internal functioning of thousands of tradeunions having millions of members. No standards are provided in the bill to guide the Board, and none exist in fact. *For years most of our State courts have carefully refrained from such interference* in the internal affairs of unions, *realizing both the encroachment on individual liberty* involved in thus attempting to regulate the inner functioning of voluntary associations *and the sheer impossibility of doing so effectively, wisely, and equitably.*

House Report at 76 (minority) (emphasis added). *See also* 93 Cong. Rec. 3586 (1947) (statement of Rep. Powell). Those opposing the "bill of rights" provisions, as these excerpts show, preferred a hands-off policy for both agencies and courts.

The provisions regulating the "reasonableness" of dues, § 7(b) and § 8(c)(2), did not survive in the bill agreed on by the Conference Committee. Instead, the final bill added § 8(b)(5), which made it an unfair labor practice

for unions to require initiation fees that the National Labor Relations Board "finds excessive or discriminatory under all the circumstances." 29 U.S.C. § 158(b)(5). The Senate conferees refused to agree to the House bill's "bill of rights" provisions,

> since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions . . . without further study of the structure of unions. In the opinion of the Senate conferees the language [in § 8(a)(3)] which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, *uniformly required of all members*, was considered sufficient protection.

93 Cong. Rec. 6601 (1947) (statement of Sen. Taft) (emphasis added).[4]

Some congressmen still worried that even the new provision, § 8(b)(5), "would require the Board to determine whether union fees were excessive or discriminatory." 93 Cong. Rec. 6662 (1947) (statement of Sen. Murray). "For example," one senator suggested, "in determining whether a particular fee was excessive the Board may have to decide . . . whether expenditures authorized by the union such as donations to charity were proper." *Id.* at 6662. *See also id.* at 6655, 6673. Senator Taft, the sponsor of the bill, answered such comments with the observation that "[t]he express language of [§ 8(b)(5)] shows how unfounded such an argument is." The provision, he noted, "is limited to

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[4] Congress later did enact a "bill of rights" for employees, as part ot the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* *See* United Steelworkers of America v. Sadlowski, 457 U.S. 102, 109 (1982).

initiation fees and does not cover dues." [5] 93 Cong. Rec. 7001 (1947). The purpose of § 8(b)(5), as the conferees made clear, was simply to prevent unions from continuing their closed shop monopoly of certain trades by charging exorbitant initiation fees to new employees who were not already union members. *See* 93 Cong. Rec. 6601, 7001 (1947) (statements of Sen. Taft).

Of the proposed provisions governing the use of regular dues and fees, only § 304 survived in the final bill.[6]

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[5] Subsection 8(b), as codified at 29 U.S.C. § 158(b), provides in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
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> (5) to require of employees covered by an agreement authorized under [§ 8(a)(3)] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected . . . .

[6] Section 304 was codified as 18 U.S.C. § 610, and applied to all labor unions. By the time Congress amended the RLA in 1950, however, the provision had proven largely ineffective. The Supreme Court avoided holding § 304 unconstitutional only by giving it a very narrow construction. United States v. CIO, 335 U.S. 106 (1948). After this decision the government given constitutional doubts about the statute, brought almost no new indictments under § 304 until 1955, and in 1949 Senator Taft brought about the provision's repeal in the Senate (the House failed to take action on the bill). *See* Rauh, Legality of Union Political Expenditures, 34 S. Cal. L. Rev. 153, 158-59 (1961).

Congress repealed § 304 in 1976, replacing the provision with 2 U.S.C. § 441b, which prohibits the use of agency shop fees by labor organizations in connection with federal elections. 2 U.S.C. § 441b(b)(3). Plaintiffs have not pursued a claim here under this statute, which requires administrative proceedings for enforcement. *See* 2 U.S.C. § 437g(a).

This legislative history makes it clear that Congress explicitly delineated the types of union dues collection that it deemed impermissible: exorbitant initiation fees and fees spent for political elections. Congress went this far and no further; it excluded no other areas of expenditure from the union's power to collect dues under a union security agreement. And "[a]s a matter of statutory construction, the authorities appear uniform in holding that an explicit exclusion appearing in and specifically limited to one provision of a statute and not included in another provision of the same statute logically implies that the exclusion is inapplicable as to the latter provision." League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9 Cir.), *cert. denied*, 444 U.S. 943 (1979).

We cannot entertain a claim alleging a union's inappropriate use of funds without contradicting Congress' intent in the Taft-Hartley Act to avoid general external supervision of internal union matters. Those in Congress who opposed external supervision of union dues collection argued that it was invasive and impractical. Here the proceedings exemplify precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection. The proceedings for this single union have already required over 9 years, over 4,000 pages of testimony, over 3,000 documents, and over 50 motions filed in the district court. Two district judges, a special master, batteries of lawyers, and countless witnesses, stenographers and clerks have contributed their services to this project. Even now the accounting remains unfinished, as the majority has ordered a remand. This exhaustive inquest, into every jot and tittle of a union's finances and activities, is *not* what Congress intended in passing the Taft-Hartley Act.

The argument that § 8(a)(3) of the NLRA limits the use of agency shop fees relies heavily on the established interpretation of § 2, Eleventh of the Railway Labor Act

(RLA), 45 U.S.C § 152.[7] The Supreme Court has construed that provision to deny a union authority to spend dissenting employees' agency fees for purposes other than collective representation. *See Street*, 367 U.S. at 768-69; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 80 L. Ed. 2d 428, 442 (1984). I do not agree that this interpretation of the RLA controls our interpretation of § 8(a)(3). "Even rough analogies [between the RLA and the NLRA] must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (footnote omitted). Here, despite the similarity of certain phrases in the RLA's § 2, Eleventh and the NLRA's § 8(a)(3), careful comparison of the NLRA and the

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[7] Section 2, Eleventh is part of a list of general duties established by the RLA. As codified at 45 U.S.C. § 152, this section provides in pertinent part:

> Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

RLA shows that the two provisions differ in terms of language, legislative history, and statutory purpose. The settled interpretation of the RLA therefore does not bind us here.

Congress enacted § 2, Eleventh in 1950, when it amended the Railway Labor Act. The Railway Labor Act as amended in 1934, unlike the National Labor Relations Act of 1935, prohibited closed and union shop agreements. As the time of the 1934 amendments, railroad unions urged Congress not to prohibit all union security agreements in their industry. Only one of the standard unions, however, had any security agreements in its contracts at that time; the rest remained committed to the principle of voluntarism despite their support for allowing such agreements. *Street*, 367 U.S. at 750-51, 753 n.8. Given this "strong and long-standing tradition of voluntary unionism," and the opposition of some legislators to the union shop, Congress embraced a "policy of complete freedom of choice of employees to join or not to join a union." *Id.* at 750.

The RLA ban on union security agreements continued until 1950, when Congress amended the Act to authorize union shop agreements whether or not permitted by state law. In pressing for this amendment, the railroad unions argued that it was "essentially unfair for nonmembers to participate in the benefits of [labor unions' activities] without contributing anything to the cost." Railroad witnesses emphasized that their collective bargaining costs were higher than those for other industries, since the RLA's complex administrative machinery "requires expense which is not known to unions in outside industry." Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. 10 (statement of George M. Harrison, spokesman for Railway Labor Executives' Association), *quoted in Street*, 367 U.S. at 761-62. "This argument was decisive with Congress." *Street*, 367 U. S. at 762.

The legislative history of the 1950 RLA amendment is ambiguous on the issue of limiting unions' use of agency shop fees. Indeed, as the Supreme Court has noted in Abood v. Detroit Board of Education, 431 U.S. 209, 232 (1977), its opinion in *Street* "embraced an interpretation of the Railway Labor Act not without its difficulties." Two congressional committee witnesses, both railroad company representatives, did complain that the proposed RLA amendments would place no limits on unions' use of dues. *See Ellis*, 80 L. Ed. 2d at 440 n.9; *Street*, 367 U.S. at 767 n.16. "That Congress enacted [§ 2, Eleventh] over these objections arguably indicates that it was willing to tolerate broad exactions from objecting employees." *Ellis*, 80 L. Ed. 2d at 440.

The Supreme Court in *Street* nevertheless read into § 2, Eleventh a limitation on the railroad unions' power to use agency shop fees. In doing so, the Court pointed out that § 2, Eleventh was revised to meet the objections that the RLA as amended would not adequately protect the free speech rights of dissenting employees. *Street*, 367 U.S. at 765-66. The railroad unions responded to the concerns voiced about such employees by suggesting the addition of a proviso to prevent job loss for "employees to whom membership was denied or terminated for any reason other than the failure to the employee to tender the periodic dues, fees, and assessmnts uniformly rquired as a condition of acquiring or retaining membership." Railway Labor Act Amendments: Hearings on H.R. 7789 Before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 247 ("House Hearings"), *quoted in Street*, 367 U.S. at 765. The union president presenting this proviso, the *Street* opinion notes, suggested that the revision "remedies the alleged abuses of compulsory union membership as claimed by the opposing witnesses, yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activ-

ity." House Hearings at 253, *quoted in Street*, 367 U.S. at 765-66 (statement of George M. Harrison). To this protective proviso Congress "affixed . . . limitations." *Street*, 367 U.S. at 766.

The Supreme Court discerned in these revisions of § 2, Eleventh a "congressional concern over possible impingements on the interests of individual dissenters from union policies." This legislative history convinced the Court that

> Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 [Railway Labor] Act, but rather made inroads on it for the limited purpose of eliminating the problems created bythe "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent.

Id. at 767. The Court has found that a union's use of compelled dues for purposes other than its collective bargaining duties does not serve the "limited purpose" of eliminating the free rider problem, and is therefore an unjustifiable inroad on the policy of full freedom of employee choice violating § 2, Eleventh. *See id.* at 768-69; *Ellis*, 80 L. Ed. 2d at 441-42.

The legislative history and purpose of the NLRA and Taft-Hartley Act do not permit the same interpretation of § 8(a)(3). First, the NLRA never embraced the 1934 RLA's policy of "complete freedom of choice of employees to join or not to join a union" that "survives in § 2, Eleventh." *Street*, 367 U.S. at 750, 767. Rather, the NLRA's policy has been to leave the question of union shop agreements to state law. Hence the settled interpretation of § 2, Eleventh—based on the underlying policy of the 1934 Railway Labor Act where the statute and legislative history are ambiguous—does not control interpretation of a provision in the NLRA, which does not share the 1934 Railway Labor Act's underlying policy.

If the legislative purposes behind § 8(a)(3) and § 2, Eleventh were identical, one would expect that the Supreme Court in *Street* would have looked to the NLRA for guidance in interpreting § 2, Eleventh. The *Street* opinion, however, does not significantly rely on or discuss either the NLRA or § 8(a)(3). Instead, it focuses on the distinctive features of the railroad industry and the Railway Labor Act in construing § 2, Eleventh.

Second, the Taft-Hartley Act's legislative history, unlike the RLA's, is unambigous on the issue of limiting the use of union shop fees. Congress explicitly considered the problem of unions using compelled fees when it enacted the Taft-Hartley Act in 1947. Its response was to prohibit union spending in the particularly sensitive area of federal elections. It explicitly rejected amendments requiring more thoroughgoing supervision of union shop fees, however, as unjustifiably intrusive and unmanageable. We should respect this Congressional intent in construing § 8(a)(3). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 53 U.S.L.W. 4433, 4437 (U.S. Apr. 1, 1985), quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

I reject the argument that § 8(a)(3) and § 2, Eleventh may not properly be construed differently The argument is grounded on remarks made by a few congressmen during the enactment of the RLA. But these remarks are only general comments about the similarity of the Taft-Hartley union security provisions, rather than explicit comparisons of § 8(a)(3) with the provisions of the RLA. Plaintiffs quote Senator Taft as declaring during debate that the bill "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." In fact, Senator Taft commented:

> In effect, the bill inserts in the railway mediation law almost the exact provisions, *so far as they fit*, of the Taft-Hartley law . . .

93 Cong. Rec. —— (1950), *reprinted in* Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, as Amended (1926 through 1966) at 1134 (1974).

The conclusion that § 8(a)(3) and § 2, Eleventh are identical in purpose should not rest on such ambiguous comparisons. Indeed, comparing the language of § 8(a)(3) and § 2, Eleventh reveals several obvious differences. Section 8(a)(3) states what employers may do in making agency shop agreements; § 2, Eleventh states what employers and *unions* may do. Section 8(a)(3) prohibits employer discrimination against an employee if the employer has reasonable grounds for believing that an employee was denied union membershaip for an impermissable reason; § 2, Eleventh has no such explicit provision. Section 8(a)(3) allows termination for an employee's failure to pay "the periodic dues and the initiation fees" uniformly required from employees; § 2, Eleventh speaks instead of "periodic dues, initiation fees, and assessments (not including fines and penalties)." Section 8(a)(3) agency shop agreements may give employees 30 days to join the union); § 2, Eleventh provides for 60 days.

I also question placing much reliance on RLA legislative history to interpret a provision of the Taft-Hartley Act. It is better to focus on the history of the Act one is trying to interpret, rather than on a few remarks made during the debate on an entirely different bill. To me, the history of the Taft-Hartley Act itself is a surer guide to its meaning than general comments made years later, and I think that it supplies the answer to the issue of statutory construction that this case presents.

II. Constitutional Claim

Essential to plaintiffs' first amendment claim is a finding of state action.[8] "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." Hudgens v. NLRB, 424 U.S. 507, 513 (1976). Thus the challenged use of agency fees is subject to constitutional scrutiny only if it is conduct "fairly attributable" to state or federal government. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Plaintiffs do not argue that this conduct is fairly attributable to state government, and do not persuade me that it is fairly attributable to the federal government.

Defendants' use of agency fees is not fairly attributable to the federal government because it fails to satisfy the Supreme Court's two-part standard for determining the existence of state action. Under this standard, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Further, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937. These inquiries overlap to some extent, reflecting "the necessarily fact-bound inquiry" that confronts us. *Id.* at 939.

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[8] I do not think that defendants argue that federal courts lack jurisdiction of the plaintiffs' constitutional claim. Rather, they argue that, because the challenged union activity is not state action, plaintiffs have failed to state a cognizable claim. Thus defendants' belated motion to dismiss for lack of state action was brought under Fed. R. Civ. P. 12(b)(6) (failure to state a claim) rather than Rule 12(b)(1) (lack of jurisdiction). This was an appropriate way to raise the state action issue. *Cf.* Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023 (4 Cir. 1982) (Russell, J.) (affirming dismissal for failure to state a claim because no state action).

The first step of the *Lugar* inquiry requires a determination of whether the alleged deprivation results from "the exercise of a right or privileges having its source in state authority." *Lugar*, 457 U.S. at 939. The agency shop agreement here, and the attendant use of the plaintiffs' compelled fees, do not result to any direct way from the exercise of such power. Nothing in the NLRA compels the adoption of an agency shop agreement; the Act simply provides that federal law does not "preclude" such an agreement between an employer and its employees' bargaining representative. 29 U.S.C. § 158(a)(3). Nor does the Act preempt contrary state law; it merely permits agency shop agreements where there is no state "right to work" law. 29 U.S.C. § 164(b). As the Senate Report on the original NLRA noted, "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935), *quoted in* S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947); *see also* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 308-10 (1949). The Taft-Hartley Act provided no significant encouragement to enter into union security agreements either, banning the closed shop and letting state law continue to determine the legality of the agency shop.

The NLRA's policy of neutrality regarding agency shop agreements does not make entering into such an agreement an exercise of a government-created right. "[I]t is well settled that a state's mere authorization of private conduct does not justify a finding of state action." Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983) (holding hat NLRA's agency shop provision does not satisfy either part of *Lugar* test); *see also* Price v. International Union, U.A.W., No. H-84-1221 (D. Conn. Apr. 11, 1985) (same).

The only right exercised here that can in any way be said to "cause" the alleged deprivation is the right of an

exclusive bargaining representative to make a collective agreement with an employer that is binding on all employees. The exercise of this exclusive bargaining power, it is true, "causes" the alleged deprivation in the limited sense that, but for such power, the union would be less likely to secure an agency shop agreement and thus plaintiffs' fees. This causal link, however, is too attenuated to attribute state action to defendants here, as the second part of the *Lugar* approach makes clear.

The second *Lugar* inquiry is whether an NLRA union can "fairly be said to be a state actor." "Something more" is required to convert a private party into a state actor than the exercise of statutory rights. *Cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's exercise of statutory right to sell goods on which storage charges not paid was not state action). Otherwise, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

Monopoly status, which is what the right to be exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. This issue was settled in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. *Id.* at 351-52. The Court refused to find state action in suits against state-created monopolists where "there was insuffiicent relationship between the challenged actions of the entities involved and their monopoly status." *Id.* at 352.

The majority sees in the unions' monopoly status a nexus with the challenged actions sufficient to justify a finding of state action. It notes in particular the Supreme Court's recognition of the extent of union power in Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202

(1944): "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . ." *See ante* at p. 47. This was exactly the argument made by the plaintiffs in United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982), but rejected by the Court. There plaintiffs challenged a union rule prohibiting nonmember contributions in union elections as, *inter alia*, state action violating the first amendment. The plaintiffs pointed to the monopoly power conferred on unions over a given employer's job market. They argued, also citing *Steele*, that because of its exclusive bargaining power the union was "clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ." Brief for Respondent Sadlowski at 48; *see also* Reply Brief for Petitioner Steelworkers at 9. The Court dismissed this argument in a footnote for lack of state action. *Sadlowski* at 121 n.16.

The existence of federal contract enforcement machinery in the NLRA is also insufficient to transform a union's activity into state action. Thus the Supreme Court detected no state action in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). There plaintiffs challenged an enforceable collective bargaining agreement providing for affirmative action hiring. Before addressing plaintiffs' Title VII challenge, the Court stated that the challenged plan "does not involve state action." *Id.* at 200, *cited in Sadlowski* at 121 n.16; *see also* American Communications Association v. Douds, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such.")

The lack of a sufficient nexus here between the government's involvement and the private party's challenged actions parallels the situation in Rendell-Baker v. Kohn, 457 U.S. 830 (1982).[9] There the Supreme Court rejected

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[9] For further discussion comparing *Rendel-Baker* to the union situation, see *Kolinske*, 712 F.2d at 479-80.

the argument that extensive government regulation and 90% subsidization of a private school for problem students made the school a state actor. Several employees claimed that firing them for criticizing school policy violated the First Amendment. The Court refused to find state action, even though the state's continuing support of the school enabled it to limit the free speech of a certain portion of the labor force (teachers at the school). In finding no state action, the Court pointed to the interposed conduct of a private party exercising independent judgment; this judgment, rather than the government's involvement, yielded the challenged action. *Id.* at 839-42.

Here the independent judgment of employees, employers, and unions separates the potential for union monopoly bargaining power conferred by the federal government from the alleged free speech deprivation. I do not think that *Rendell-Baker* can be distinquished on the ground that the instant case is one in which the parties act under the compulsion of federal law. Federal legislation has not compelled the establishment of unions, nor has it compelled or even encouraged the adoption of agency shop agreements, as shown above. Indeed, the NLRA does not compel the acceptance of any collective bargaining terms. *See* 29 U.S.C. § 158(d). Rather, the employees, employers, and unions make these choices.

The NLRA differs in its general policy of neutrality regarding agency shop agreements from the Railway Labor Act. This case is therefore distinguishable from Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956), which is asserted to compel a finding of state action in this case. There the Supreme Court found in the RLA the "something more" required to convert a union into a state actor. In that case plaintiffs sued to enjoin enforcement of a union security agreement in Nebraska, where a right-to-work law prohibited labor agreements from requiring union membership. The Court found governmental action because the RLA preempted

the state right-to-work law, and thus permitted the challenged union shop provision:

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed . . . .

Id. at 232. Because of the RLA's federal preemption, the Court concluded, "[a] union agreement made pursuant to the Railway Labor Act has . . . the *imprimatur* of the federal law upon it . . . ." *Id.* at 232 (emphasis added).

The basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval, on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA. The Court noted this distinction in *Hanson* itself:

> The parallel provision in § 14(b) of the Taft-Hartley Act . . . makes the union shop agreement give way before a state law prohibiting it.

Id. at 232 n.5. It noted the distinction again in *Abood*, emphasizing that federal preemption was the basis for finding government action:

> Unlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in Hanson would have been invalidated under Nebraska law. *The Hanson Court accordingly reasoned that government action was present* . . . .

Abood, 431 U.S. at 218 n.12 (emphasis added).

Lacking the preemption provision, the NLRA places no federal imprimatur on agency shop clauses. State law

rather than federal law is "the source of power and authority for such agreements" under the NLRA. The rationale for finding federal government action in *Hanson*, then, does not support such a finding here. Most courts have therefore found that *Hanson* does not compel a finding of state action for an agency shop agreement made under the NLRA or an analogous state statute. *See Kolinske*, 712 F.2d 471, 476 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10 Cir. 1971) ("[w]hatever the wisdom of this reasoning for the Railway Labor Act, it has no applicability to the National Labor Relations Act"); Linscott v. Miller Falls Co., 440 F.2d 14 (1 Cir.) (Coffin, J., concurring in judgment), *cert. denied*, 404 U.S. 872 (1971); *Price*, No. H-84-1221, slip op. at 11 (D. Conn. April 11, 1985); Pasillas v. Agricultural Labor Relations Board, 202 Cal. Rptr. 739 (Cal. App. 1. Dist. 1984) (following *Kolinske* and *Reid* in finding *Hanson* not to control state action question for state labor law patterned after NLRA). *But see* Seay v. McDonnell Douglas Corporation, 427 F.2d that *Hanson* controls finding of state action in NLRA 996, 1003 (9 Cir. 1970) (assuming without discussion context); *Linscott, supra* (majority opinion).[10]

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[10] The majority protests that the preemption distinction emphasized by the Supreme Court in *Hanson* and *Abood* is irrelevant. The present case, it notes, arises in a state that does not prohibit agency shop clauses, so that agency shops are permitted in Maryland under both federal acts. "So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA." Majority opinion, *ante* at 44. Maryland law and the NLRA, however, merely permit private parties to negotiate an agency shop agreement. Neither Maryland law nor the NLRA encourages or requires such a provision, and, as noted above, "it is well settled that a state's mere authorization of private conduct does not justify a finding of state action." *Kolinske*, 712 F.2d at 478. The RLA, on the other hand, encourages agency shop agreements by preempting all contrary state law, and thus mandates a finding of federal government action under *Hanson*. *Hanson's* holding is not limited to states with a prohibition against railway agency shop clauses

The other case asserted to be controlling is *Abood*. There employees challenged the agency shop clause in a public sector collective bargaining agreement. A state statute patterned on the NLRA authorized such a clause. The Court assumed that this public employment contract involved state action. It upheld the use of agency shop fees to support collective bargaining, but found the use of such fees for political activities unconstitutional.

Abood is distinguishable on the state action issue because it involved the state in the roles of both legislator and employer. *See also Kolinske*, 712 F.2d at 477 (holding *Abood* distinguishable). I do not read the statement in *Abood* that "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights," 431 U.S. at 232, as meaning that the differences between public- and private-sector bargaining do not translate into differences for *state action* purposes. Indeed, the obvious difference for state action purposes is that in the private sector case the state may merely authorize a private agreement. In the public sector cases, the state not only authorizes the agreement in its role as legislator, but affirmatively enters into such an agreement in its role as employer.

The *Abood* opinion compared the public sector case with the earlier private sector RLA cases "simply because the existence of governmental action in both contexts requires analysis of the free expression question". *Id.* at 226 n.23. The comment that "differences between public- and private-sector bargaining simply do not translate into differences in First Amendment rights" was a response to the argument that the greater *extent* of government action in the public sector case required more extensive first amendment safeguards than the government

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on the books for the RLA to preempt, since the RLA also has prevented states that might otherwise have enacted such a prohibition from doing so.

action in the RLA cases. *See id.* ("Hanson nowhere suggested that the constitutional scrutiny of the union-shop agreement was watered down because the governmental action operated less directly than is true in a case such as the present one.") At the same time, the Court explicitly noted that "[n]othing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints." *Id.*

It is for these reasons that I would reverse the judgment of the district court and direct it to dismiss the complaint.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

JUDGMENT

In accordance with the Memorandum and Order dated March 4, 1983 and the Memorandum of even date herewith, it is ORDERED and ADJUDGED:

1. That Judgment be, and is hereby, entered in favor of the plaintiffs and against the defendants in the following amounts plus interest:

Doris Ambrose	$341 + $102	= $443
Jacqueline Brandon	$341 + (−$81)	= $260
Rue Downey	$185 + 0	= $185
Kathleen Heil	$126 + 0	= $126
Clay Lutz	$185 + 0	= $185
Roland Merkle	$224 + 0	= $224
Doris Morrow	$104 + 0	= $104
Frances Phillips	$324 + $128	= $452
Lois Stallings	$324 + $627	= $951
Harry Swartz, Jr.	$328 + $91	= $419
John Hurley	$444 + $808	= $1252
Harriet Lipschultz	$442 + $648	= $1090
Barbara McGaughey	$87 + 0	= $87
Marion Northrop	$442 + $647	= $1089
Mary Anna Cox	$284 + $510	= $794
Ethel Merryman	$309 + $497	= $806
Vivian Reedy	$283 + $	= $283
Barbara Russell	$319 + $322	= $641

2. That Judgment is entered for the plaintiffs and against the defendants in the amount of $37,279.64 as reimbursement for the amount paid by the plaintiffs as compensation to the Special Master.

3. That the defendants shall pay costs.

4. That the CWA defendants, its officers, agents, and employees are permanently enjoined from retaining and from attempting to retain from the plaintiffs for the period April 1, 1983 to December 31, 1983, and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA defendant who has used the system of recordkeeping and allocations designed by the experts of CWA as set forth on page 43 of the Supplemental Report of Special Master Wilson K. Barnes filed September 14, 1981 [hereinafter the "Supplemental Report"] after remedying certain defects and omissions set forth on pages 45 and 46 of the Supplement Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of that Supplemental Report. The plaintiffs through their counsel and an expert or experts selected by them shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the plaintiffs have been granted access to those papers as above provided, counsel and the experts of the plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA defendants on the 46th day after the issuance of the report shall pay to the plaintiffs the amount stated in the report. If such a statement is filed, the court on the papers or after such hear-

ing as the court may deem proper shall determine the non-retainable amount. The CWA defendants shall each fiscal year hold in an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth.

In the event that plaintiffs' review results in a determination that the amount initially certified as non-retainable by the independent Certified Public Accountant must be increased, the CWA defendants, as part of the monitoring expense for their new system, shall pay to the plaintiffs an amount of money representing the reasonable value of the services of counsel and the experts of the plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the plaintiffs may submit by motion the question of the amount of such reasonable compensation to the court for determination, which, after hearing the CWA defendants, will award a monetary judgment, if appropriate, to the plaintiffs for the amount determined by the court.

Dated at Baltimore, Maryland this 9th day of August, 1983.

/s/ James R. Miller, Jr.
JAMES A. MILLER, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

MEMORANDUM

The plaintiffs have objected to what they consider to be two clerical errors in this court's Memorandum dated March 4, 1983. The first of these involves the calculation of impermissible expenditures. For the reasons stated in the March 4th Memorandum and for the reasons stated by the defendants in their response to the plaintiffs' motion, the court believes it employed the correct calculation.

The plaintiffs, defendants, and now the court all agree, however, that the initial calculation of rebates by the court should have indicated that it covered the period from January 1, 1976 to September 30, 1979, not from January 1, 1976 to August 18, 1980. The error will be compensated for in the computation of rebates for the second period which will begin from September 30, 1979.

The parties have stipulated to the amounts paid by the plaintiffs for the period from September 30, 1979, and the court will enter judgment for the plaintiffs for 79% of the fees paid for this period as well as the initial period. It will also award the plaintiffs the amount paid by them to compensate the Special Master.

All other costs should be sought by the procedures set forth in Rule 54, Fed. R. Civ. P., and the Local Rules of this court.

Finally, the parties have sought modification of the permanent injunction as drawn by the Special Master and approved by this court. The plaintiffs argue, once again, for material changes, some of which were rejected by this court and some of which were rejected by the Special Master previously. As this court indicated in its March 4, 1983 Memorandum, it believes the form of injunction drafted by the Special Master is appropriate. It has, however, considered the changes proposed by the defendants, and finding them to be minor, reasonable, and just, the cou. will incorporate them into the permanent injunction entered herein.

Judgment, including permanent injunctive relief, will be entered herein.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

Dated: August 9, 1983.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

The complaint in this action was filed on June 4, 1976 by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). The plaintiffs are employed under collective bargaining agreements between their employers and the Communication Workers of America (CWA). Under the contracts, CWA, CWA District II, and CWA Locals 2100, 2101, 2108 and 2110 are the exclusive representatives of the employees. Plaintiffs, while they have not sought to become members of CWA, are subject to the collective bargaining agreements which require that they pay to CWA, as a condition of employment, an amount equal to the periodic dues and assessments of the union.

The plaintiffs have alleged that their agency fees are, at least in part, used to support partisan political or ideological causes unrelated to collective bargaining. The plaintiffs have objected to such expenditures and to other non-collective bargaining expenditures, alleging a viola-

tion of their First Amendment right to express themselves without governmental control and without prior governmental restraint.

On March 16, 1979, the late C. Stanley Blair, a judge of this court, held that the plaintiff agency fee payors were entitled to a declaratory judgment that the requirement of the payment by them of fees to finance activities other than "collective bargaining, contract administration and grievance adjustment," was improper. The judgment order referred the case to a special master for determination of "the percentage of the defendant's budget dispersed for purposes other than the three permissible ones." (Paper No. 71). The judgment included provisions (1) that if the parties were unable to agree upon a master, the court would appoint one; (2) that if the parties were unable to agree on an equitable allocation of the cost of reference, the court would direct the master to make a recommendation; (3) that once the percentage of the defendant's budget dispersed for impermissible purposes had been determined, the plaintiffs would be entitled to a refund of the excess paid by the plaintiffs for the period since January 1, 1976; and (4) that the judgment was conditioned on the plaintiff's dismissal of the AFL-CIO and its named affiliates as defendants. The AFL-CIO and its named affiliates were dismissed, with prejudice, on March 30, 1979. The parties were not able to agree upon a master, and on May 3, 1979, Judge Blair entered an Order appointing Honorable Wilson K. Barnes as Special Master.

In his March 16, 1979 Memorandum and Order Judge Blair held as follows:

> "(1) Pursuant to the Agency Shop Clause in its collective bargaining agreement with plaintiffs' employees, the defendant, CWA, has collected and continues to collect from the plaintiff amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs."

(Paper No. 70). The Special Master, on reference, was ordered to make the following determination:

"The Special Master shall exercise those powers confererd by this Court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper No. 73).

On August 18, 1980, Special Master Barnes filed a written report (Paper No. 114), setting forth his findings of fact and conclusions of law in response to the referral order. The defendants subsequently filed a motion to recommit this matter to the Special Master pursuant to Rule 53(e). The motion was granted by the undersigned judge (Paper No. 130) on January 19, 1981.

The first issue resubmitted to the Special Master dealt with his findings relating to the obligations of the Local Unions. The court concluded:

"The Special Master's report, however, is devoid of any specific findings or conclusions regarding the activities of the Local Unions. Given the fact that the Local Unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or further findings concerning the Local Unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the

report relates only to the portion of the fees expended by defendant CWA, the Special Master should submit further findings on the following issues:

> (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;
>
> (2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous Order of this court."

Further testimony on those issues was not required by the court unless Judge Barnes, in his role as Special Master, deemed it appropriate.

The second issue before the Special Master on recommital involved his determination of future injunctive relief. The Special Master's original report contained the following recommendation:

> "The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to plaintiffs as Agency Fee Payors."

The court granted the defendants' motion to recommit the matter to a Special Master to enable the defendants to present additional evidence designed to modify the percentage figure for future injunctive relief. Specifically, the defendants sought to "present evidence to

the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment." (Paper No. 130 at 6). The court held that "[t]he injunctive relief regarding future collection should, however, be more flexible," (Paper No. 130 at 6), than that proposed in the Special Master's original report.

On remand the Special Master was requested specifically to submit additional findings on the following issues:

> "(1) Do the unions' current record keeping policies in any way alter the factual finding previously submitted to the court?
>
> (2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissive activities?
>
> (3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?
>
> (4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior ones in this action?"

(Paper No. 130 at 7).

Finally, the Special Master was required to clarify his original findings with respect to clerical errors. (Paper No. 130 at 8).

On re-reference the Special Master held a series of conferences and hearings on the questions submitted. Detailed briefs were prepared by both sides and discovery was reinstituted, resulting in over 800 additional pages of transcript. The plaintiffs introduced 2,296 exhibits;

the defendants introduced 17 and additionally introduced extensive expert reports on CWA's proposed record keeping and accounting systems.

Special Master Barnes submitted his supplementary report (Paper No. 180) on September 18, 1981. The parties filed their objections to the report (Paper Nos. 184-86) and the defendants filed motions for action on the supplementary report (Papers 196, 197, 201). The plaintiffs responded to these motions (Paper No. 203). Finally, the defendants filed for leave to file a motion for judgment (Paper No. 204) with supporting memoranda (Papers 207, 208). The plaintiffs have opposed that motion (Paper Nos. 205, 208) and the defendants have replied (Papers 206, 210). The court has considered the motions and memoranda of the parties and has concluded that an oral hearing on these matters is not necessary. Local Rule 6(E).

OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

A. *Application of the Original Report to the Local Unions*

With regard to the first issue re-submitted to the Special Master, *i.e.*, findings related to the obligations of the local unions, the local unions, but not the plaintiffs, have objected (Paper No. 186) to the supplemental report. They object on the ground that the supplemental report, like the original report, allegedly fails to make findings with respect to the local unions.

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2). Thus, the task of the district court here in reviewing the Special Master's findings of fact is essentially the same task as faces an appellate court reviewing the findings of fact of a district court. *See* 5A *Moore's Federal Practice*, ¶ 53.12[4]

at 53-117 & 119. (2d. ed. 1982). Findings based on oral testimony, based partially on the fact finders' evaluation of witnesses' demeanor and credibility, are entitled to greater deference than are findings based on documentary and other non-demeanor evidence. *Id.* at 53-119. This is particularly true in a case such as this, where the testimony of numerous experts was so crucial.

In his supplemental report, the Special Master has made explicit his intention in the original report that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applied also to the four local unions. Furthermore, the Special Master has complied with the court's request that the basis of his holding relative to the local unions be made specific. In pages 2 through 4 of the supplemental report, he explained that the local unions had failed to meet their burden of proof with respect to allocation of costs and that only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA. The local unions' objection that the Special Master's findings are not supported by evidence (Paper Nos. 186 and 196) is without merit for it was their burden to produce evidence which the Special Master expressly found they failed to do. Furthermore, although the local unions now argue the remedy applied to the CWA is impractical to apply to them because of their smaller staffs and responsibilities, they failed to pursue this matter before the Special Master on recommittal. This court cannot say that the Special Master's findings are clearly erroneous on this issue. Therefore, the Special Master's supplemental report with respect to the calculation of permissible expenditures by the local union will be affirmed to the same extent it is affirmed for the CWA.

B. *Organizational Fees*

Defendant CWA objects to the Special Master's finding that the expenses of organization are not permissible.

The defendant relies principally on *American Steel Foundries v. Tri-City Central Trades*, 257 U.S. 184, 209 (1921), in which the Court outlined the importance of organizational activities to a healthy union. It is not disputed that organizing is an important function of the unions, nor that these activities may indirectly benefit unions' collective bargaining positions. The evidence before the Special Master, however, failed to support the conclusion that the fees attributable to organizing were used to benefit collective bargaining *in this case*. This is not to say that with proper evidentiary support a different conclusion would not be reached on other facts. *See Ellis v. Brotherhood of Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, (Wisconsin Employment Relations Commission, Dec. No. 18408 (Feb. 3, 1981).

C. *Burden of Proof*

The CWA contends that the Special Master erred in imposing on the defendants the burden of proving permissible expenditures by clear and convincing evidence. Their first argument is that the defendant's burden as imposed by *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), should merely be one of going forward with the evidence, not one of persuasion. In support of this argument they cite the Title VII case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The opinion of Judge Blair (Paper No. 70) leaves no doubt that the burden placed on the defendants was one of persuasion. For this reason alone, if for no other, the court believes the doctrine of the law of the case dictates that the burden not be shifted at this time. Additionally, *Burdine*, on which the defendants rely, was not decided at the time of Judge Blair's decision. In any event, *Burdine* involved a Title VII claim and no such claims have been raised here. This court does not agree with

the defendants' broad reading of *Burdine* which would apparently reassign to all plaintiffs in all phases of all actions the burden of proof. There is nothing in *Burdine* to justify its application beyond Title VII.

In addition, the defendant CWA argues that the Special Master erred in imposing a standard of "clear and convincing" evidence. Although this court agrees with the defendant and the Ninth Circuit, *Ellis v. Brotherhood of Railway Clerks, supra* at 1070, that the Special Master erred in relying on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to support his conclusion that the appropriate standard was "clear and convincing evidence," the court disagrees with the conclusion that it was error to apply the standard at all.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that:

> "Contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interest.' "

431 U.S. at 234 (*quoting* from *Buckley*; citations omitted).

The Court then concluded that there was no significant difference for First Amendment purposes between limiting a campaign contribution and compelling contribution.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of

> First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced. . . ."

431 U.S. at 234 through 235 (footnotes omitted).

What is significant is that the Supreme Court held the expenditure limitations at issue in *Buckley* to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45. *See* 424 U.S. at 16. This was consistent with numerous prior decisions determining that prior restrains on First Amendment freedoms carry a heavy presumption against their validity. *See, e.g., Heller v. New York*, 413 U.S. 491 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Tetel Film Corp. v. Cusack*, 390 U.S. 139 (1968). Given the basic First Amendment freedoms at issue in this case and the solicitude with which the Supreme Court has protected them, the Special Master was justified in applying a "clear and convincing evidence" test in this action.

D. *Adverse Inferences*

The defendant CWA also objects to the adverse inferences drawn by the Special Master from the failure of the CWA to produce 30 employees of CWA to testify regarding their allocation of time to permissible projects. There is no contention here that the defendant could not produce the witnesses, and the Special Master found that the plaintiffs had produced evidence indicating that "most of the 30 employees mentioned . . . are presently engaged in activities which are not 'collective bargaining, contract administration, and grievance adjustment.'" (Paper No. 114 at 22). Thus, the adverse inference rule was correctly applied. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2nd Cir. 1981); *Blow v. Compagnie Maritime Belge*, 395 F.2d 74 (4th Cir. 1968).

The defendant CWA also contends that the Special Master drew impermissible adverse inferences from the failure of the CWA to maintain adequate time records as suggested in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and Allen, *supra*. While it is true that the Special Master admonished the CWA for failing to keep its time record (Paper No. 118 at 23-24), his decision was, nevertheless, based, not on adverse inferences from the non-production of such records, but on the finding that without them CWA failed to meet its burden of proof, *id.* at 24.

E. *Miscalculations*

The Special Master determined that the dollar amounts of permissible expenditures for collective bargaining, contract administartion, and grievance adjustment, equaled $4,424,000 in a total expenditure of $29,240,000. Likewise, the Special Master determined expressly that $5,052,000 of the total administrative expenses of $8,065,000 were permissible (Paper No. 114, Appendix D), but a portion of these "permissible" administrative expenses were attributable to impermissible activities in the same proportion that all non-administrative permissible activites bore to non-administrative impermissible activities. (The point raised by the plaintiffs (Paper No. 203 at 27) is well taken. The administrative expenses of $5,052,000 characterized as "*permissible*" should have been termed "allocable" to reduce confusion.) Therefore, the Special Master applied the calculation formula supplied by Dr. Bean, an expert produced by CWA, to arrive at the percentage of the total expenditures which constituted permissible expenses and applied that percentage to the allocable administrative expenses to arrive at that part of $5,052,000 which was attributable to collective bargaining, grievance adjustment and contract administration. The total of permissible expenses for collective bargaining, grievance adjustment and contract administration, or $4,424,000, was divided by the total expendi-

ture excluding cost of administration. The Special Master determined that this produced a figure of approximately 24%. (This finding is clearly erroneous as this calculation properly gives a figure of approximately 21%.) Based on the Bean formula, the percentage of allocable administrative cost of $5,052,000 attributable to collective bargaining, grievance adjustment, and contract administration was 24% or $1,212,000. The administrative costs attributable to collective bargaining, grievance adjustment and contract administration thus equaled $1,212,000. This figure added to the costs of collective bargaining, grievance adjustment and contract administration equaled $5,636,000. The percentage of $5,636,000 to the total expenditure is approximately 19% which the Special Master held was the percentage of permissible costs.

Application of the Bean formula has not been shown to be clearly erroneous, but the mathematical computation has. The percentage of permissible non-administrative expenditures to the whole should have been 21%. Twenty-one percent of $5,052,000 is $1,060,920 producing a total of permissible expenditures of $6,112,920 which produces a percentage of permissible expenditures of 21% ($6,112,920 divided by $29,240,000). The total impermissible expenditure is, thus, 79% (100% minus 21%).

F. *Application of Calculation to Years Other Than 1978*

The plaintiffs argued on recommittal that the 19/81 percentages (now 21/79) could not be applied to any year other than 1978. The Special Master concluded, however, that Dr. Bean's assertion that 1978 was a typical year was credible (Paper No. 114 at 8 and 13). The plaintiffs have cited the court to no evidence rebutting this finding and, therefore, the court does not find it clearly erroneous.

G. *Injunctive Relief*

All parties object to the injunction as proposed by the Special Master. (Paper 182 at 51-52). The defendants' proposed modifications are premised on issues addressed previously and need not be repeated here as the court has rejected them for the reasons stated. The plaintiffs' primary objection is that the proposed injunction is too vague to fall within the clear and precise standards applicable to First Amendment issues. The scheme accepted by the Special Master is admittedly not precise and clear, but it does fit within the stated expectations of the Supreme Court in *Allen, supra* at 122, that "absolute precision in the calculation of [the proportion of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." The Supreme Court's caveat is equally applicable in this constitutional challenge as it was in the statutory challenge before the *Allen* court.

The plaintiffs also take exception to the language of the Special Master which suggests how the defendants may meet their burden in the future. Such language is *dicta* and as such the court considers it, if erroneous, to be harmless.

H. *Costs Allocation*

The plaintiffs protest the allocation of 19% of the cost to them as prevailing parties. The court finds this protest well founded and pursuant to Rule 53(a), Fed. R. Civ. P., will direct that the defendants pay the entire amount of compensation of the Special Master.

I. *Clerical Errors*

There being no objection by any of the parties, the corrections of the two clerical errors noted in the court's Order of recommittal are adopted. (Paper No. 103 at 8).

CONCLUSION

The original report of the Special Master (Paper No. 114) as modified by the supplemental report of the Special Master (Paper No. 182) is adopted with the modifications expressed herein.

Judgment will be entered against the defendants and in favor of the plaintiffs for the agency fees paid from January 1, 1976 to August 18, 1980 in the following amounts:

Doris Ambrose	$340.89
Jacqueline S. Brandon	$340.89
Rue Downey	$184.86
Kathleen Heil	$126.40
Clay Lutz	$184.86
Roland Merkle	$224.36
Doris Morrow	$104.28
Frances Philips	$324.07
Lois Stallings	$324.07
Larry Swartz, Jr.	$328.26
John Hurley	$444.41
Harriet Lipschultz	$441.53
Barabara McGaughey	$ 86.90
Marion Northrop	$441.53
Mary Anna Cox	$283.63
Ethey Merryman	$308.50
Vivian Reedy	$282.82
Barbara Russell	$319.18

Judgment will also be entered for the plaintiffs listed above against the defendants for 79% of the agency fees paid for August 18, 1980 to March 31, 1983. By separate order, the plaintiffs will be required to submit affidavits setting forth the amount of agency fees paid during this period.

Judgment will also be entered in favor of the plaintiffs granting them permanent injunctive relief.

Judgment will be entered for plaintiffs against defendants for 100% of costs, including compensation of the

Special Master. Because the parties have to date each paid 50% of said compensation, the plaintiffs will be ordered to advise the court of the total compensation to enable the court to enter judgment for plaintiffs for the amount paid by them.

Accordingly, it is this 4th day of March, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The plaintiffs shall submit affidavits setting forth the amount of agency fees paid from August 18, 1980 to March 31, 1983 within twenty (20) days of the date of this Order.

(2) The plaintiffs shall advise the court of the total compensation paid or owed the Special Master by them within twenty (20) days of the date of this Order.

(3) The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

APPENDIX F

U.S. DISTRICT COURT
DISTRICT OF MARYLAND

No. M-76-839

BECK, *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

January 19, 1981

MILLER, District Judge: —This action was filed by various non-union C & P Telephone Company employees to challenge the "agency fee" provision of CWA's contract with C & P. The "agency fee" provision requires that all non-union C & P employees contribute to CWA an amount equal to union dues in order to compensate for benefits which non-union employees receive as a result of union efforts. The plaintiffs allege that this provision violates their First Amendment rights in that portions of the fees collected are used for purposes other than collective bargaining, contract administration, and grievance adjustment.

On March 16, 1979, the late Honorable C. Stanley Blair entered an order in this case in which he held:

"(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiff's employees, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to col-

lective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs,"

(Paper 70). This case was then referred to the Honorable Wilson K. Barnes, as Special Master, for a determination of the following:

"The Special Master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper 73).

On August 18, 1980, Special Master Barnes filed a written report setting forth his findings of fact and conclusions of law in response to the referral order. (Paper 114). The defendants subsequently filed a motion to recommit this matter to the special master (Paper 118), which is presently pending before this court.

I. *Analysis of Defendants' Motion*

The defendants prpose that this matter be re-referenced to the Special Master, pursuant to Fed. R. Civ. P. 53(e), for the following purposes:

(1) To make a separate determination of the financial obligations of the Local union defendants to the plaintiffs.

(2) To determine amounts properly chargeable in the future by CWA, based upon the union's revised record-keeping procedures.

A. *Obligations of the Local Unions*

The defendants' principal basis for seeking an order referring this matter back to the Special Master is that the Special Master's report contains no specific findings or conclusions regarding the local unions. The defendants contend that the agency fees in question are initially paid to the defendant local unions which retain approximately 60% of the fees. The remaining 40% of the fees is paid over to the national union, CWA, by the locals.

In his report, Special Master Barnes concluded that "CWA has improperly charged the Agency Fee Payors 81% of the dues paid by them to CWA." (Paper 114, p. 39). The defendants contend that this finding relates only to that portion of the agency fee actually transmitted to CFA, i.e., approximately 40% of the total fee remitted. The defendants therefore seek a separate determination of the amount to be refunded out of the portions of the agency fees retained by the various local unions.

The plaintiffs contend that the Special Master's report implicitly holds that the 81%/19% ratio applies to all CWA units considered. The plaintiffs memorandum (Paper 121) goes on the summarize the testimony presented to the Special Master concerning the operation of the local unions. Based upon this information, the plaintiffs contend that the evidence presented justifies no greater charge against the plaintiffs than the 19% as determined in the special master's report.

[1] The Court has reviewed Special Master Barnes' report which contains a thorough and detailed analysis of defendant CWA's expenditures. The plaintiffs have proffered that the hearings before the Special Master took twenty-seven days, ten of which were devoted to testimony concerning the activities of the defendant local unions. Separate briefs were filed by defendant CWA and the defendant local unions. The Special Master's report, how-

ever, is devoid of any specific findings or conclusions regarding the activities of the local unions. Given the fact that the local unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or for further findings concerning the local unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the report relates only to the portion of the fees expended by defendant CWA, the special master should submit further findings on the following issues:

(1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

(2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Further testimony on these issues is not required unless Special Master Barnes deems it appropriate.

B. *Determination of Future Injunctive Relief*

The defendants seeks a modification of the Special Master's proposed conclusion of law regarding injunctive relief. The Special Master's report contained the following recommendation:

"The plaintiffs listed in Schedule F are entitled to a permanent injunction restraning CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that

amounts in excess of such 19% were properly chargeable in the future to the plaintiffs as Agency Fee Payors." The defendants propose that the court refer this matter back to the Special Master to enable them to produce evidence to modify the percentage figure for future injunctive relief.

In Judge Blair's order of March 16, 1979, the burden of proving the proportion of expenditures properly chargeable as an agency fee was placed on the union defendants. Within this framework, the Special Master disallowed many of defendant CWA's expenditures since the unions failed to meet their burden of showing that those expenses were attributable to collective bargaining, contract administration, or grievance adjustment activities. In many instances, expense items were wholly disallowed because the unions' record-keeping procedures failed to establish the portion of that expense which should be allocated to chargeable activities.[1] The defendants now seek to present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment. The defendants argue that future injunctive relief should reflect this modified percentage figure.

Judge Blair's Order of March 16, 1979, succinctly set forth the relief to which the plaintiffs are entitled as follows:

"Thus it appears that the plaintiff agency fee payers are entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is im-

[1] As an example, staff salary expenses were disallowed since the union records failed to provide any basis for a reliable estimate of the portion of time the individual staff workers spent on collective bargaining, contract administration or grievance adjustment activities.

proper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future amounts authorized by the agency shop in excess of the amount necessary for the three enumerated purposes."

This case was referred to the Special Master for a specific findings of the percentage amounts improperly collected from the plaintiffs in the past. The injunctive relief regarding future collections should, however, be more flexible in order to accommodate possible changes in the unions' procedures. If at all possible, the final injunction should contain a self-executing procedure which will enable the allowable percentage figure to fluctuate in order to reflect current union spending policies. This procedure will avoid the necessity of locking the court into the role of overseeing the unions' activities on a permanent basis.

[2] Given the Special Master's familiarity with the detailed factual record in this case, the court believes that the issue of framing future injunctive relief will be handled most expeditiously if addressed in the first instance by the Special Master. On remand, therefore, the Special Master should submit additional findings on the following issues:

(1) Do the unions' current record-keeping policies in any way alter the factual findings previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activties?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection set forth in this order and the prior orders in this action?

The Special Master may hold additional evidentiary hearings limited to the issues raised in the above questions. The parties may also engage in additional discovery, in accordance with the rulings of the Special Master, limited strictly to these issues.

C. *Clerical Errors*

The defendants have noted two apparent clerical errors in the Special Master's report. In Appendix D, i.e., the list of administrative expenses which were held to be permissible, the $416,000 figure listed as "Development and Research" should have been labeled "Other Headquarters". Similarly, the $24,000 figure listed as "Professional Fees" should have been labeled "Staff Moves." (Refer to Appendix A-2). Since this matter is being referred back to the Special Master for other clarifications, it seems appropriate to ask that the Special Master also indicate whether these labeling errors in any way effect his findings in this case.[2]

II. *Conclusion*

It is ORDERED this 19th day of January, 1981, by the United States District Court for the District of Maryland as follows:

(1) Defendants' Motion to Recommit this Matter to the Special Master (Paper 118) is GRANTED;

(2) This action will be referred back to Special Master Wilson K. Barnes, pursuant to the provisions of Fed. R. Civ. P. 53(e);

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[2] The plaintiffs indicate that the parties agreed that the $146,000 figure, however labeled, is a permissible administrative expense. With regard to the $24,000 figure, the plaintiffs contend that the Special Master would have disallowed the figure had he considered it a deduction for "staff moves" rather than for "professional fees". This appears to be true if the defendants failed to establish that the moves were in any way related to or necessitated by activities connected with the three permissible purposes.

(3) Special Master Barnes shall file a supplemental report within ninety (90) days, in accordance with the opinions set forth in this Memorandum and Order;

(4) If the parties are unable to agree upon an equitable allocation of costs of the re-reference, the court will then direct the master to make findings of fact and recommendation with respect to the apportionment of costs as between the parties which the court may adopt.

(5) The Clerk shall mail a copy of this Memorandum and Order to the Special Master and counsel.

APPENDIX G

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*,

March 16, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

This is an action brought against the Communications Workers of America (CWA) by twenty individuals who pay "agency fees" to that union and its various Maryland locals. The complaint alleges, in essence, that the defendant union has collected and continues to collect from the plaintiffs monies in excess of the amount actually allocable to expenses incurred in connection with collective bargaining, contract administration and grievance adjustment in violation of plaintiffs' first amendment rights.

This court held by Memorandum and Order of January 12, 1979, 468 F. Supp. 87 (D. Md. 1979), that the plaintiffs would not be required to exhaust internal union procedures prior to seeking a judicial determination of their rights. The court also determined at that time that

the case was appropriate for declaratory judgment, but decided to confer informally with counsel prior to issuing its judgment. Since that time, the defendant has raised two issues which must be decided before judgment in the case may be entered.

The first is whether the plaintiffs have standing to challenge the CWA procedure at all, since, by their own admission, they never invoked the rebate procedure and, according to the defendant, several of them failed to direct formal letters of protest to the union prior to filing the complaint in this case.[1] This court finds that the plaintiffs do have standing to bring this action.

The requirement that objectors voice their protest was set out in *International Association of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1803, 6 L.Ed.2d 1141 (1961) in which the Court stated that relief in such a case "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." The Court enlarged upon this statement in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 119 n.6, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), when it stated:

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[1] This court notes that the defendant has taken a somewhat ambivalent position throughout this litigation vis-a-vis the standing of the plaintiffs. CWA filed a serious motion to dismiss or in the alternative to stay the proceedings pending plaintiffs' exhaustion of the internal union rebate procedure, which was denied by Memorandum and Order of this court. January 12, 1979, 468 F.Supp. 87 (D.Md. 1979). In its motion, CWA asserted that several of the plaintiffs had invoked the procedure and should be required to exhaust, and that others who had not invoked the procedure should be dismissed for lack of standing. More recently, in its Motion for Reconsideration, etc. (*see* infra at 95) CWA states at 2, 4 that "[a]ll plaintiffs are considered to have invoked the procedure for all years since 1976."

> Respondents first made known their objection to the petitioners' political expenditures in their complaint filed in this action; however, this was early enough.

Thus, it is clear that the law does not require an affirmative demonstration of protest as a condition precedent to bringing suit. All that is required is that the individual dissenter make known his position so that, in fairness to the union, no one who does *not* object to the union's political expenditures is able to secure relief. *Street, supra,* 367 U.S. at 774, 81 S.Ct. 1784; *Allen, supra,* 373 U.S. at 119, 83 S.Ct. 1158. In the instant case, the plaintiffs unequivocally made known their protest by filing suit. As in *Allen, supra,* that is "early enough." Accordingly, defendant's motion to dismiss for lack of standing will be denied.

Second, CWA has recently moved this Court to reconsider its Memorandum and Order of January 12, 1979 or, in the alternative, to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In its motion for reconsideration, the defendant relies upon *Reid v. United Auto Workers,* 479 F.2d 517 (10th Cir.), *cert. denied,* 414 U.S. 1076, 94 S.Ct. 572, 38 L.Ed.2d 483 (1973), and *Seay v. McDonnell Douglas Corp.,* 371 F. Supp. 754 (C.D. Cal. 1973), *aff'd in part, reversed in part,* 533 F.2d 1126 (9th Cir. 1976), and asserts that CWA's "Partisan Politics-Policy" (copy appended to January 12 Memorandum and Order, 468 F. Supp. at 92, is in every respect satisfactory and that the plaintiffs should be required to exhaust internal union remedies. The defendant union has not brought to the court's attention any material which was not previously considered in connection with the motion to dismiss or to stay pending exhaustion. This court considered carefully the applicability of both *Reid* and *Seay* but concluded that in this case, it would not be helpful to require the plaintiffs to invoke and exhaust the union's rebate procedure. The decision to grant or deny a stay is a discretionary one, 1 C.J.S. Actions § 133, and this

court is satisfied that the exercise of its discretion was sound. Since the defendant has cited no auhtority which the court has not long had before it, and for the reasons already stated, the motion to reconsider the Memorandum and Order of January 12, 1979 will be denied.

In the alternative, the defendant has moved this court to certify an interlocutory appeal under 28 U.S.C. § 1292(b). That section provides for such an appeal where an otherwise non-appealable order involves a controlling question of law as to which there is substantial ground for difference of opinion and which, if resolved, may materially advance the ultimate termination of the litigation. Section 1292(b), a narrow exception to the longstanding rule against piecemeal appeal, is limited to exceptional cases. *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3d Cir. 1958); *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959). This court is not of the opinion that this is an issue which requires application of the statute: it involves neither a "controlling question of law," nor would an interlocutory appeal "materially advance the ultimate termination of [this] litigation."

The question decided by this court in its January 12, 1979 Memorandum and Order was whether, under the facts of the case, it should stay proceedings and require the plaintiffs to exhaust the internal union rebate procedure prior to seeking judicial determination of what proportion of their "agency fees" could properly be collected by the union. This court found guidance in the Supreme Court's remark that a stay in such a case is "not strictly required by any doctrine of exhaustion of remedies," *Abood v. Detroit Board of Education*, 431 U.S. 209, 242, 97 S.Ct. 1782, 1803, 52 L.Ed.2d 261 (1977), and determined, under facts peculiar to this case, that a stay would not promote resolution of this controversy. As noted above, the decision to deny the stay was within the discretion of the court. It involved more a question of

fact than one of law; it certainly did not call into issue a "controlling question of law as to which there is substantial ground for difference of opinion" as required by 28 U.S.C. § 1292(b). The language and spirit of the section indicate that a discretionary decision such as this one ought not be treated as a controlling question of law. *J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65, 66-67 (5th Cir. 1964).

Second, and more important, it does not appear that an immediate appeal would promote the termination of the litigation. This court denied the requested stay for the express reason that it did not appear that exhaustion of the CWA rebate procedure would in any way move the case toward resolution. See Memorandum and Order of January 12, 1979, 468 F. Supp. at 91 (D.Md. 1979). The amount of time necessary for the series of judicial and intra-union hearings and appeals contemplated by the defendant's motion for certification under § 1292(b) would better be calculated in years rather than months, and, in all likelihood, at the end of it all, this court would be called upon to make the determination it is now prepared to make. *Cf., e.g., Gottesman, supra*, 268 F.2d at 197. Accordingly, the defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) will be denied.

The above outstanding issues having been resolved, there remains for this court the task of declaring its judgment as to the rights and obligations of the parties. This case presents an actual controversy within the jurisdiction of this court and the appropriate pleadings have been filed; accordingly, declaratory judgment is proper. 28 U.S.C. § 2201.

It is clear that in both the private and the public sectors, workers who are not union members may be obliged to pay "agency fees" to the recognized labor union as a condition of employment when the union-management contract requires such payments. *NLRB v. General*

Motors Corp., 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976). It is equally clear that labor organizations may not collect and disburse such "agency fees" for purposes other than "collective bargaining, contract administration, and grievance adjustment" without seriously implicating the first amendment rights of free speech and association of fee payors who object. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26, 232 and 235-36, 97 S.Ct. 1782, 1794, 52 L.Ed.2d 261 (1977).

In this case it is undisputed that the defendant union, CWA, has negotiated an "agency shop" clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. *See* Exhibits A-1 and A-2 to the Complaint. It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than "collective bargaining, contract administration, and grievance adjustment." Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three numerated ones.

Thus it appears that the plaintiff agency-fee payors are entitled to a declaratory judgment that exaction of fees for activities other than "collective bargaining, contract administration and grievance adjustment" is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158; *Street, supra* at 774, 81 S.Ct. 1784. This relief necessarily requires a determination of what proportion of the union's total expenditures is attributable to activities other than collecive bargain-

ing, contract administration and grievance adjustment. *Street, supra*, 367 U.S. at 775, 81 S.Ct. 1784; *Allen, supra* at 121, 83 S.Ct. 1158. The burden of proving such proportion rests upon the union, but "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required," *Allen, supra* at 122, 83 S.Ct. at 1163.

Accordingly, it is the judgment of this court, to be set forth separately by the Clerk as required by Fed. R. Civ. P. 58, that:

(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiffs' employers, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the first amendment rights of the plaintiffs;

(3) That the parties may agree upon the percentage of the defendant's budget disbursed for purposes other than the three permissible ones;

(4) That if, at the expiration of thirty (30) days from the date of this Order, the parties remain unable so to agree, then, pursuant to Fed.R.Civ.P. 53, the matter will be referred to a master of the parties' own choosing;

(5) That if, at the expiration of ten (10) days from that date, the parties are unable to agree upon a master, then this court will appoint a master;

(6) That in the event of reference to a master, of either the parties' or the court's choosing, if the parties are unable to agree upon an equitable allocation of the costs of the reference, then this court will direct the master to make findings of fact and recommendations with respect to the apportionment of costs as between the parties which the court may adopt;

7) That when it has been determined what portion of the agency fees the defendant has collected improperly, the defendant is to refund to each plaintiff for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration and grievance adjustment; and

(8) The provisions of this Order are expressly conditioned upon the plaintiffs' dismissing the AFL-CIO and its named affiliates from this action, as counsel for the plaintiffs represented informally they would do upon entry of this Order.

It is SO ORDERED.

It is further ORDERED that:

(1) Defendant's motion to dismiss for lack of standing be, and the same hereby is, DENIED.

(2) Defendant's motion for reconsideration be, and the same hereby is, DENIED; and

(3) Defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) be, and the same hereby is, DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*

Jan. 12, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

Plaintiffs, twenty individuals employed by various Maryland subsidiaries of American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P) and subject to collective bargaining agreements between the employers and the defendant union, Communication Workers of America (CWA),[1] are not members of the defendant union or of any labor organization. They are "agency fee payors"; that is, they are required to pay to the union as a condition of employment an amount equal to periodic union dues and assessments, so that they do not share in benefits secured by collective bargaining without shar-

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[1] The plaintiffs' employers, AT&T and C&P, were also named originally as parties defendant. By Memorandum and Order of April 13, 1977, this court granted the employers' motions to dismiss. Accordingly, the Union (CWA) and its subsidiary locals and committees are the only remaining defendants and are hereafter referred to collectively as "defendant" or "Union" or "CWA."

ing the cost. This "agency shop" arrangement is not prohibited by Section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) and has consistently been upheld by the United States Supreme Court. *NLRB v. General Motors Corp.*, 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil Chemical & Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976).[2]

The plaintiffs do not challenge the validity of the agency shop but bring this action seeking, *inter alia*, to enjoin enforcement of CWA's agency shop provision insofar as the fees collected from the plaintiffs are allegedly used for non-collective bargaining purposes. The plaintiffs allege in substance that their coerced contributions are used to support lobbying efforts and political campaigns which plaintiffs oppose in violation of plaintiffs' right under the first amendment to express themselves freely, and without prior restraint.[3]

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[2] Section 14(b) of the National Labor Relations Act permits the states individually to prohibit such union-security agreements. 29 U.S.C. § 164(b). *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 757, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963) and *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), but Maryland has not seen fit to do so.

[3] The plaintiffs oppose, in fact, the expenditure of agency funds for *any* purposes not directly related to collective bargaining, not just those primarily political in nature. They oppose, for example, expenditures for union social functions, maintenance of strike benefit funds, and scholarship funds, *inter alia*. Complaint ' 16. While not denying that these expenditures may raise serious questions, for the purposes of this motion, it is sufficient to consider only the allegation that the Union is collecting and disbursing agency funds for political purposes which the plaintiffs oppose.

This court reserves for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the non-collective bargaining purposes complained of, noting that there does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for "political

If the Union is, as alleged, spending fees exacted pursuant to the agency shop arrangement in support of ideological activities to which plaintiffs object, such expenditures would, of course, seriously implicate the plaintiffs' fundamental first amendment interests. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 237, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) *and see Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The United States Supreme Court has suggested that labor unions might avoid infringing the first amendment rights of dissenters by establishing internal procedures for determining what proportion of the union budget is allocated to political purposes and then refunding the proportionate amount and excusing dissenting agency-fee payors from "contributing" that amount in the future. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 122-23, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *International Association of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *See also Abood, supra*, 431 U.S. at 237 n. 34, 240, and n. 41, 97 S.Ct. 1782. Such an internal procedure, the Court supposed, might avert prolonged and expensive litigation. *Allen, supra*, 373 U.S. at 123, 83 S.Ct. 1158.

Allen and the other decisions of the Supreme Court recommending the establishment of an internal union accounting procedure do not expound in detail upon the nature of the procedure required. *Street, supra*, 367

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purposes" which are clearly impermissible and expenditures for "collective bargaining, contract administration, and grievance adjustment," which are, of course, permissible. *Compare Internat'l Assn. of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) and *Bhd. of Ry. and S. S. Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 121, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) *with Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 and 236 and n. 33, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

U.S. at 775, 81 S.Ct. 1784, states merely that the dissenting employee is entitled to recover an amount proportionate to the fraction of the union budget which is spent on political purposes, although the employee is not required to trace his fees through the union machinery. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158, established that the union which collects and disburses the agency fees bears the burden of determining the correct proportion:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.

373 U.S. at 122, 83 S.Ct. at 1163.

In *Abood, supra*, 431 U.S. 209, 240, 97 S.Ct. 1782, 52 L.Ed.2d 261, the Court did not enlarge upon the practical proposal described in *Allen*, but did note that the union in that case had adopted an *Allen*-type plan [4] during the pendency of the litigation. The Court remanded the case to the state court and in doing so suggested that

> [i]n view of the newly adopted Union internal remedy, it may be appropriate under Michigan law even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.

431 U.S. at 242, 97 S.Ct. at 1803. The Court, in a footnote, declined to express an opinion as to the constitutional sufficiency of the internal remedy, and noted that

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[4] The union procedure in *Abood* is described at 431 U.S. 240 n. 41, 97 S.Ct. 1782. The union initially calculates the proportion of political expenditures, but its determination is subject to review by an impartial board.

if the employees concluded, after having exhausted, that the internal procedure was deficient, they would then be entitled to a judicial consideration of the adequacy of the remedy. The defendant Union [5] in this case has instituted an internal rebate procedure and has moved to dismiss or in the alternative to stay [6] these proceedings pending plaintiffs' exhaustion of the internal union remedy.

The plaintiffs contend that they should not be required to exhaust the internal union remedy prior to resort to judicial consideration. They assert that, in the first instance, internal union procedures are not applicable to those who are not members and, in any event, the CWA procedure is insufficient in many respects to safeguard the plaintiffs' constitutional rights. It is apparently the plaintiffs' contention that, contrary to the clear mandate of *Allen*, the determination which expenditures are political and which are permissible should under no circumstances be left to the union. They urge

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[5] The procedure adopted by CWA is set out in a resolution of the Executive Board effective July 1, 1974, entitled "Partisan Politics—Policy," a copy of which is attached hereto as Appendix. The policy provides that any member or non-member covered by a union-security agreement who objects to "the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature" is entitled to a refund. The Administrative Committee of the Executive Board determines the approximate proportion of dues or fees attributable to political activity. If the payor objects to the amount calculated by the Administrative Committee, he may appeal to the Executive Board of the Union. There is a further and final appeal to the Convention. There is no provision in the policy for review by an impartial body.

[6] The defendants moved to dismiss the claims of those plaintiffs who have not invoked the CWA rebate procedure and to stay proceedings with respect to those who have invoked it. There is a factual dispute as to whether any of the plaintiffs invoked the procedure. Since this court is of the opinion that exhaustion of the union remedy will not be required in this case as a condition precedent to litigation, it is unnecessary to determine which, if any, of the plaintiffs invoked the procedure.

that only an Article III court may decide an issue which goes to the plaintiffs' fundamental first amendment rights.

Since this court has determined that on the facts of this case, exhaustion will not be required, it is unnecessary to reach the numerous constitutional issues the plaintiffs raise. The defendants' request for a stay pending exhaustion will be denied solely for the reason that it appears from the record to date that exhaustion would not promote settlement of the disputes and would cause unnecessary delay.

Although the Supreme Court has, as noted, demonstrated a preference for internal union procedures as an alternative to costly litigation, *Allen, supra*, 373 U.S. at 123, 83 S.Ct. 1158, *Abood, supra*, 431 U.S. at 240, 97 S.Ct. 1782, it does not appear that a stay is "strictly required by any doctrine of exhaustion of remedies." *Id.* at 242, 97 S.Ct. at 1802. The Court in *Abood* counseled that exhaustion in that case might afford "a possible means of settling the dispute." [7]

A stay, generally speaking, is a matter of convenience, not of right, and may be granted or denied in the exercise of the sound discretion of the court. The grounds upon which a stay of proceedings may be granted or denied on the facts and circumstances in each particular case. *See generally* 1 C.J.S. Actions §§ 131-137. In this case, a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy. It is extremely unlikely that exhaustion will substantially alter the positions of the parties. For one thing, it is not completely clear from the proceedings to date that the union's rebate is proce-

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[7] This court notes that, on remand, the Michigan Court of Appeals, for reasons of its own, did not require exhaustion as a condition precedent to litigation. *Ball v. City of Detroit*, 84 Mich.App. 383, 269 N.W.2d 607 (1978).

durally or substantially adequate. The plaintiffs will almost certainly be dissatisfied with the Union's determination of the amount of dues-equivalent payments to be refunded,[8] if for no other reason than that the CWA procedure, unlike the union's procedure in *Abood*, provides for no review by an impartial party. *See also, e.g.*, Plaintiffs' Offer of Proof, Court Paper No. 46, which details the numerous defects the plaintiff's expect to encounter in the rebate procedure. Since the court has already been called upon to determine the sufficiency of the rebate procedure, and not merely to review the calculations of an accountant, it appears that only delay will result from requiring the plaintiffs to negotiate all three levels of the CWA plan before challenging it. There may, of course, be cases in which exhaustion is appropriate, but this is not one of them.

Accordingly, for the reasons stated, defendant's motion to dismiss or in the alternative to stay these proceedings pending exhaustion of the internal union remedy will be denied.

The plaintiffs have moved for summary judgment on Count VI of the Complaint. This court seeks essentially a declaratory judgment that the defendants may not raise as an affirmative defense the fact that this litiga-

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[8] In this case, certain, if not all of the plaintiffs directed form letters to the Union protesting the expenditure of their funds for non-collective bargaining purposes. In at least three cases, the Union recipient, Mr. James R. Pizzano, understood the purpose of the letters to be to invoke the rebate provision of the "Partisan Politics—Policy." Accordingly, the Union's accountant was directed to determine what percentage of the dues receipts for the fiscal year ending in March 1976 was attributable to "political and legislative programs." The accountant determined that the correct percentage was 5.78%, yielding a per capita refund of $2.95. *See* Affidavit of James R. Pizzano, attached to Defendant's Motion to Dismiss. Court Paper No. 36. The plaintiffs have already asserted that the Union's arithmetic is incorrect (although they deny that they invoked the procedure).

tion is financed in whole or in part by the National Right to Work Legal Defense Foundation, in possible contravention of 29 U.S.C. § 411(a)(4) (1970). It is sufficient to note that over the two-year history of this litigation, no defendant has ever raised this defense. It follows that there is no ripe "case or controversy" on this point, and it would exceed this court's power to issue the prayed-for declaration. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Accordingly, plaintiffs' motion for summary judgment will be denied.

It is this 12th day of January, 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendant's motion to dismiss or in the alternative to stay these proceedings be, and the same hereby is, DENIED; and

2. That plaintiffs' motion for summary judgment as to Count VI of the Complaint be, and the same hereby is, DENIED.

APPENDIX

The following policy statement was read and discussed by the Board. It concerns members or non-members who may be covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision and who may object to that portion of dues or agency fees which may be used for political activities.

PARTISAN POLITICS—POLICY

Effective *July* 1, 1974, the following policy is hereby established:

1. Any member or nonmember who is covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

2. The Administrative Committee of the Executive Board shall determine the appropriate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year.

3. A member or nonmember may express objection to the Secretary-Treasurer of the Union by written notification by registered or certified mail. Such objection must be received by the Secretary-Treasurer (postmarked) during the first fourteen (14) days of Union membership or agency association or during fourteen (14) days following each anniversary of Union membership or agency association. Each such individual written objection will be only for the current year in which the objection is made. An objection may be continued from year to year by individual notifications, during each annual anniversary of

membership or agency association and the following fourteen (14) days.

4. If the member or nonmember is not satisfied with the allocation determination of the Administrative Committee of the Executive Board, there shall be a right of appeal to the Executive Board of the Union. Such an appeal must be made in writing to the President of the Union by certified or registered mail and must be made within thirty (30) days from the date of notification or publication of the Administrative Committee's determination.

5. If the member or nonmember does not accept the decision of the Executive Board, there shall be a right of appeal to the Convention. Such appeal must be postmarked within fifteen (15) days of receipt of the decision of the Executive Board. Such notificatio nshall be in writing to the President and shall be sent by registered or certified mail.

6. The portion of Union dues or agency fees to be refunded for policy purposes to an objector shall be based on the amount determined to be allocable by the Administrative Committee, or any amendment thereof on appeal. The rebate to the member or nonmember will be based on the annual dues received for the current year in which the objection is received.

Motion: Moved that the above statement be adopted.

Motion adopted
6/19/74

APPENDIX I

U.S. DISTRICT COURT
DISTRICT OF MARYLAND

No. B-76-839

BECK, *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*

April 13, 1977

Motion for Reconsideration Denied May 25, 1977

C. STANLEY BLAIR, District Judge:—This is a civil action arising out of the allegedly improper expenditure of agency fees by the defendants unions. Also named as defendants are the plaintiffs' employers; the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). AT&T and C&P have moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Under the doctrine enunciated in Conley v. Gibson, 355 U.S. 41, 45-46, 41 LRRM 2089 (1957), all material allegations in the complaint are assumed to be true and the complaint will not be dismissed unless it appears that plaintiffs can prove no set of facts which will entitle them to relief.

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[1] Although a hearing on the motion has been requested, the court finds one unnecessary under Local Rule 6.

Plaintiffs are twenty Maryland citizens who are employees or either AT&T or C&P, and are subject to collective bargaining agreements negotiated between AT&T and C&P and the Communications Workers of America (C.W.A.) which is the exclusive bargaining representative. Plaintiffs are not union members, but pay agency fees to C.W.A. equivalent to union dues as part of an agency shop. The crux of the complaint is that the defendant unions have used the agency fees for illegal activities including, *inter alia*, political agitation, propaganda and lobbying, direct or indirect compaign contributions, salaries and other benefits to union officials, and benefits to union members such as insurance and medical plans, scholarship funds, and social and recreational funds. In the Fourth Claim for Relief, plaintiffs allege that AT&T and C&P have violated 29 U.S.C. § 158(a)(3) by permitting illegitimate disbursements of agency fees by the C.W.A. and that AT&T and C&P have violated 29 U.S.C. § 185 and breached implied conditions of the collective bargaining agreement. In the Fifth Claim for Relief, plaintiffs allege violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. AT&T and C&P have moved that these counts, the only ones in which they are named as defendants, be dismissed and plaintiffs have filed an opposition.

Plaintiffs do not challenge the validity of the agency shop arrangement. See NLRB v. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963); Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 53 LRRM 2318 (1963); Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1128 n. 2, 92 LRRM 2063, 2064 (9th Cir. 1976). The agency shop arrangement and the complaint in this action are similar to that in International Ass'n of Machinists v. Street, 367 U.S. 740, 48 LRRM 2345 (1961) where the Court stated:

> [T]he union shop agreement itself is not unlawful . . . The appellees therefore remain obliged, as a

> condition of continued employment, to make the payments to the respective unions called for by the agreements. . . . [A]ppellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objections, not from the enforcement of the union-shop agreement by the mere collection of funds.

367 U.S. at 771, 48 LRRM at 2356. Defendants cite Reid v. McDonnell Douglas Corp., 443 F.2d 408, 77 LRRM 2609 (10th Cir. 1971), in support of their motion to dismiss. In Reid, the Tenth Circuit upheld the dismissal of a similar complaint against an employer. 443 F.2d at 412-13, 77 LRRM at 2613. In their opposition to the motion to dismiss, plaintiffs argue that the Reid holding is inapposite because it

> is so absurd as to require no discussion. It amounts to sustaining the dismissal of the Complaint, either on the theory that recovery against the Company might be unlikely, or that the damage to be recovered against the Company would be small. Both propositions should be rejected out of hand. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wolman v. Tose, 467 F.2d [29] (4th Cir. 1972); Allison v. California Adult Authority, 419 F.2d 822 (9th Cir. 1969); Asher v. Reliance Ins. Co., 308 F.Supp. 847 (N.D. Cal. 1970).

Initially the court notes that in Reid, as here, the alleged violation of the employees' rights occurred not because of the collection and transfer of agency fees by the employer, but because of union expenditure of these funds. Plaintiffs' grievance is with the unions, not with AT&T or C&P. In a similar case, Seay v. McDonnell Douglas Corp., 427 F.2d 996, 74 LRRM 2600 (9th Cir. 1970), the Ninth Circuit reversed the district court's dismissal on jurisdictional grounds of a class action against the corporation and the International Associa-

tion of Machinists and Aerospace Workers local. The court found that jurisdiction existed and instructed the district court that

> plaintiffs on remand should be permitted to amend to more clearly set out their claim and to state a cause of action against McDonnell Douglas if such is possible.

427 F.2d at 1004, 74 LRRM at 2607. On remand, the employer's motion to dismiss was once again granted. Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 756 n. 2, 85 LRRM 2007 (C.D.Cal. 1973). This dismissal was not appealed. Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1128 n. 1, 92 LRRM 2063, 2064 (9th Cir. 1976). Despite plaintiffs' assertion that the Reid holding should be "rejected out of hand," the best that can be said for the four cases cited by plaintiffs is that all are distinguishable and dismissal was inappropriate. The court finds that no claim has been alleged which will entitle plaintiffs to relief against AT&T and C&P on the Fourth Claim for Relief, and their motion to dismiss will be granted.

AT&T and C&P have moved to dismiss the claims under 42 U.S.C. § 1983 on the ground that the alleged acts are purely private in character and are without the requisite state action. Plaintiffs argue that sufficient governmental action exists because the agency shop arrangement is authorized under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). Plaintiffs attempt to equate the terms governmental action and state action in an effort to bring this suit within the "under color of law" requirement of section 1983 and cite Barrett v. United Hospital, 376 F.Supp. 791 n. 18 (S.D.N.Y. 1974), and McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976). Barrett involved the question of whether there was sufficient state involvement by a private nonprofit hospital to fall within the ambit of state action. Although the Barrett

court did make reference to federal and state involvement as governmental action, the discussion is only significant in the context of activities which are traditionally governmental functions. Barrett has no application to this case. If anything, McLellan supports the defendants' position rather than plaintiffs'. There the Fifth Circuit affirmed the dismissal of a section 1983 claim brought by a private corporate utility company because the utility's action did not fall within the purview of state action. Nothing suggests that the activities of AT&T or C&P are anything other than private and in the absence of state action plaintiffs' section 1983 claim against them will be dismissed.

AT&T and C&P have moved to dismiss plaintiffs' claims under 42 U.S.C. § 1985(3). Unlike section 1983 which requires "state action," section 1985(3) reaches purely private conspiracies whether or not the conspirators are acting under the color of state law. In Griffin v. Breckenridge, 403 U.S. 88, 9 FEP Cases 1196 (1971), the Supreme Court set out the elements of a cause of action under section 1985(3). They are: (1) the defendants must conspire, (2) for the purpose of directly or indirectly depriving a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law, (3) acts by the defendants in furtherance of the object of the conspiracy whereby (4) another was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States. 403 U.S. at 102-3. Thus, if the object of the alleged conspiracy did not include a violation of law other than section 1985(3) the plaintiff would not be deprived of the protection of the laws. McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 925 (5th Cir. 1977 (rehearing en banc). The allegations of the complaint in this case do not state a claim that AT&T and C&P conspired with anyone to act contrary to law. To the contrary, the allegations make it clear that the agency fees paid by the

plaintiffs were paid pursuant to a collective bargaining agreement lawfully entered into under the provisions of 29 U.S.C. § 158(a)(2).

The court finds Lohr v. Association of Catholic Teachers, Local 1776, 416 F.Supp. 619, 93 LRRM 2054 (E.D. Pa. 1976),[2] extremely persuasive on this question. Lohr involved almost identical claims to those here and the district court dismissed a section 1985(3) claim against the employer. The court's holding is equally appropriate to this action.

> In this case, the collective bargaining agreement is not *per se* illegal, and the allegation that the Archdiocese knew that the union impermissibly used the agency fees paid by the plaintiffs and therefore forced plaintiffs to pay more for statutory activities than [union] members, is not sufficient to state a claim that either the Archdiocese or its representatives is a member of an unlawful conspiracy. . . .

416 F.Supp. at 623, 93 LRRM at 2056. Defendants' motion to dismiss the section 1985(3) claim will be granted.

Having failed to state a claim under section 1985(3), plaintiff's derivative claim under section 1986 must be dismissed as well. Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972); Lohr, 416 F.Supp. at 623, 93 LRRM at 2056.

Accordingly, it is this 13th day of April, 1977, ORDERED that defendants AT&T and C&P's motions to dismiss be, and hereby are GRANTED.

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[2] The court notes that plaintiffs' counsel failed to bring Lohr to the attention of the court, although counsel represented the plaintiffs in that action as well. While under no strict duty to do so, see ABA, Code of Professional Responsibility, EC 7-23, the court cannot look favorably upon such an omission in view of the relatively few cases on the question presented and the irrefutable fact that counsel knew of the Lohr decision.

MEMORANDUM AND ORDER

By Order dated April 13, 1977, the court granted the motions to dismiss of American Telephone & Telegraph and C & P Telephone Company. Plaintiffs have filed a motion for reconsideration or alternatively for certification pursuant to Federal Rule of Civil Procedure 54(b). Upon consideration of the authorities cited by plaintiffs and defendants, it is this 25th day of May, 1977, ORDERED that plaintiffs' motion for reconsideration of the court's April 13, 1977 Order and plaintiffs' motion for certification are DENIED.

The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

SUPPLEMENTAL REPORT OF WILSON K. BARNES, SPECIAL MASTER

Order of Re-Reference to Special Master
Dated January 19, 1981

Report filed September 14, 1981

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

SUPPLEMENTAL REPORT OF WILSON K. BARNES, SPECIAL MASTER

This Court, by its Order of May 3, 1979 appointed Wilson K. Barnes as Special Master with certain powers and duties as set forth in that Order. The Special Master filed his Report in accordance with the reference to him on August 18, 1980 (Original Report).

Thereafter, the Defendants, Communications Workers of America, Inc. (CWA), and various Local Unions filed a Motion in the District Court to recommit this matter to the Special Master and after hearing arguments of counsel and considering their briefs on the subject, the Court by its Order of January 19, 1981 granted the Motion of the Defendants to recommit for the purpose of making certain explanations, corrections and additional findings as set forth in the Order of January 19.

The Special Master has proceeded with a number of hearings in the recommitted matter, which included the taking of a substantial amount of testimony. Counsel for the respective parties have presented comprehensive and helpful briefs and memoranda on a variety of questions to the Special Master, including several discovery issues,

and have ably presented the positions of their respective clients.

The matters presented to the Special Master by the Order of January 19, 1981 will now be considered separately under appropriate headings.

1.

Local Unions' Expenditures and Allocations in the Original Report

The Special Master intended that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applicable to and control the expenditures by the four Local Unions, i.e., Local 2100, Local 2101, Local 2108 and Local 2110, including, of course, the 60 percent of the fees in question retained by the Local Union Defendants. This is *implicit* in the calculations appearing in Appendix F attached to the Original Report. In retrospect, it would have been better if the Special Master had made his intention in this regard, *explicit* rather than to leave it to implication and the Special Master is happy to have the opportunity to make his intentions explicit in this Supplemental Report.

In the letter dated June 6, 1980 from Matthew A. Kane, Esquire, attorney for CWA and the Local Unions to the Special Master, attached hereto as "Supplemental Report Exhibit No. 1," enclosing a study of the "Classification of Local Expenditures" by the four Local Unions, attached hereto as "Supplemental Report Exhibit No. 2," Mr. Kane presented the basis factual data in regard to the position of the Defendants relating to these Local expenditures. Mr. Kane also presented to the Special Master the argument of the Defendants in a separate brief filed at the time of argument before the Special Master. These documents were carefully considered by

the Special Master prior to the submission by him of the Original Report.

It was the thought, however, of the Special Master that in view of the length and detailed findings in the Original Report in regard to the CWA expenditures *vel non*, and their allocation as permissible or impermissible, it would unduly expand the Original Report to inlcude a similar particularized study in regard to the Local expenditures, especially when the Special Master concluded that the same deficiencies in meeting the required burden of proof to establish expenditures made for the three permissible categories—collective bargaining, contract administration and grievance adjustment—applicable to the CWA expenditures were also applicable to the Local Union expenditures.

As the Special Master stated on page 7 of the Original Report:

> Inasmuch as the *Defendants* did not keep their books of account upon any theory of separation of items or amounts upon this basis, the *Defendants* have been presented with a most difficult task in meeting this burden of proof. (emphasis supplied.)

It was further stated on page 7 of the Original Report that:

> In view of the constitutional issues involved, the burden of proof requires that the *Defendants* prevail, if at all, upon "clear and convincing evidence. . . ." (emphasis supplied.)

In examining the testimony and exhibits in regard to the Local Union expenditures, the Special Master found and now finds that the best, although legally inadequate, presentation of cost figures was on behalf of Local 2101. Here, at least, Local 2101 attempted contemporaneously to accumulate costs by activity and percentage, so that using the Local 2101 testimony and exhibits as character-

istic of the expenditures of all our Local Unions would be to their advantage and entirely fair to them.

It should be kept in mind that so far as collective bargaining is concerned, the important functions in regard to it are largely performed at the national level by CWA, rather than at the Local level by the four Local Unions.

The expenditures of Local 2101 for grievance adjustment are minimal, being less than 2 percent of all annual expenditures. See Exhibits 16A through C for the years 1978, 1977 and 1976.

One of the substantial items of expenditure by Local 2101 is the salary of its President, Alfred J. Moran. But like a similar situation in regard to salary allocation in CWA, Local 2101 presented no figures which could substantiate a proper allocation. See Moran Transcript of October 31, 1971, page 165, and indeed, President Moran characterizes his attempted allocations as a "guesstimate" and indicated his time spent on contract administration and grievance adjustment was speculation stating that it was "35 percent—40 percent—maybe 50 percent" (Moran Transcript, pages 158 and 165) or that it "*might* be lower than 35 percent" or "as high as 75 percent" (Moran Transcript, page 181). (emphasis supplied.)

President Moran's testimony also indicated that much of the activity of Local 2101 consisted of political activity, including phone banks, candidate endorsement, maintenance of a legislative desk at Annapolis as well as participation in the COPE program. See pages 179, 188, 189-193, 204-209 of the Moran Transcript.

The Special Master concluded, and so finds, that in the light most favorable to the Local Unions, their permissible expenditures would be less than the 19 percent allowed CWA in the Original Report and that it was not fruitful to analyze those expenditures in detail in the

Original Report. Nor are the amounts involved as indicated on the Classification of Local Expenditures, Supplemental Report Exhibit No. 2, sufficiently large to change to any substantial or meaningful way, the percentages applicable to CWA. Counsel for the respective parties have, with the Special Master's permission, submitted additional briefs on the Local Union expenditures and their allocations, which the Special Master has carefully considered, but such consideration has not resulted in any change in the Special Master's conclusion and findings above set forth.

Inasmuch as the Plaintiffs, who might possibly benefit from such a recalculation, do not insist that this be done, the Special Master does not deem such a recalculation necessary or desirable. In sum, the Special Master holds that the 19 percent of permissible expenditures and 81 percent of nonpermissible expenditures applicable to the CWA expenditures are properly applicable to the Local Union expenditures.

2.

Two Clerical Errors in Appendix D Attached to the Special Master's Original Report

In the Court's Order of January 19, 1981, recommitting this matter to the Special Master, two clerical errors in Appendix D attached to the Special Master's Original Report of August 18, 1980 were noted with the request that the Special Master in his Supplemental Report indicate whether or not "these labeling errors in any way affect his findings in the case." The Special Master is most happy to do this and regrets the presence of those labeling errors in the Original Report.

The first error was the mislabeling of the item of $416,000, held to be a permissible item, as "Development and Research" when it should have been labeled as "Other Headquarters." As observed by the Court, however, in Note 2 on page 8 of its Memorandum and

Order of January 19, 1981, the parties had agreed that this was an item of permissible administrative expense regardless of its "label," so that the misleading in no way affects the Special Master's finding that this is a permissible item of administrative expense.

The second error was the mislabeling of the item of $24,000 as "Professional Fees" when it should have been labeled as "Staff Moves." There was no sufficient proof that the "Staff Moves" were directly related to, or reasonably necessary for the proper effectuation of collective bargaining, contract administration and grievance adjustment, so that this item of $24,000 should not have been included as "Permissible." Inasmuch as the Plaintiffs, who alone might possibly benefit in a minor and insignificant way from a recalculation based upon the elimination of the $24,000 item as a permissible item—and do not request any such recalculation—the Special Master considers the failure to eliminate this item as a permissible one, to be *de minimus* and does not affect his findings in the case.

The Special Master now turns to a consideration and report upon the revised record-keeping and bookkeeping procedures instituted by the Defendants subsequent to the filing of the Original Report of the Special Master on August 18, 1980.

3.

Revision by the Defendants of their Record-keeping and Bookkeeping Procedures Subsequent to the Filing of the Original Report of the Special Master on August 18, 1980

A. *Preliminary Matters*

The proceedings, testimony and exhibits, memoranda and arguments culminating in the Original Report will be referred to collectively as "Phase I." The proceedings, testimony and exhibits, memoranda and arguments occurring after the filing of the Original Report and

culminating in this Supplemental Report of the Special Master will be referred to collectively as "Phase II."

In the Original Report, the Special Master had already decided that the Defendants (hereinafter CWA) could only charge the Agency Fee Payors for expenditures for collective bargaining, contract administration and grievance adjustment and that CWA had the burden of proving such expenditures. The Special Master defined collective bargaining, contract administration and grievance adjustment, and formulates a rule for establishing such permissible charges, i.e., if the expenditure *directly relates to*, and is *reasonably necessary for the proper effectiveness* of collective bargaining, contract administration and grievance adjustment. The Special Master further held that in view of the First Amendment rights involved, the proof of such permissible expenditures by CWA, the burden of proof requires that CWA prevail, if at all, upon "clear and convincing evidence."

In the Original Report, it was noted that CWA did not maintain its books and records on the basis of allocating all of its expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand and all other expenditures on the other. CWA was thus presented with a difficult task in seeking to meet its burden of proof by clear and convincing evidence in this regard. Because of the lack of required data to support a number of attempted allocations —many involving substantial amounts of money—the Special Master was required to hold such expenditures to be impermissible in whole or in part, so that ultimately 81 percent of CWA expenditures were held to be impermissible and 19 percent permissible. CWA thereafter decided to revise its system of gathering data and its record-keeping and bookkeeping procedures in order to seek to meet its burden of proof in its establishing in the future many of its expenditures as permissible.

Phase II began with the filing on October 16, 1980 of a Motion by the Defendants to re-refer the case to the Special Master pursuant to Federal Rule 53(e): (1) to make a separate determination of the financial obligations of the Local Union Defendants to the Plaintiffs, and (2) to determine amounts properly chargeable in the future by the Defendants based upon their revised record-keeping procedures.

The Court, by its Memorandum and Order of January 19, 1981, granted the Motion to recommit and referred to a proposed conclusion of law recommended by the Special Master in the Original Report in regard to future injunctive relief as follows:

> The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the plaintiffs as Agency Fee Payors.

In the Memorandum and Order of January 19, 1981, the Court also stated:

> In Judge Blair's order of March 16, 1979, the burden of proving the proportion of expenditures properly chargeable as an agency fee was placed on the union defendants. Within this framework, the Special Master disallowed many of defendant CWA's expenditures since the unions failed to meet their burden of showing that those expenses were attributable to collective bargaining, contract administration, or grievance adjustment activities. In many

instances, expense items were wholly disallowed because the union's record-keeping procedures failed to establish the portion of that expense which should be allocated to chargeable activities. The defendants now seek to present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment. The defendants argue that future injunctive relief should reflect this modified percentage figure.

Substantial testimony has been produced by the respective parties in Phase II.

There have been file volumes of testimony of expert witnesses and five volumes of consultation of counsel with the Special Master, a total of ten volumes containing 800 pages. The Plaintiffs have introduced 2,296 documentary exhibits; the Defendants have introduced 17 documentary exhibits (including three substantial reports of their expert witnesses), a total of 2,313 exhibits. Counsel for the respective parties have submitted substantial and helpful briefs in support of their respective positions. Phase II has been fully and carefully tried.

In addition to this Supplemental Report, the Special Master has prepared and filed Memoranda and Orders in regard to: (1) questions concerning discovery, (2) a Motion Ne Recipiatur or to Strike, and (3) has filed an order refusing to grant a protective order.

Phase II has been tried by the parties within the legal framework established by the Original Report. Although the Defendants have indicated that they reserve the right and expect to challenge in the District Court and possibly later on appeal many of the findings and holdings of the Special Master (as well as holdings of the District Court prior to the original reference to the Special Master), the Defendants and their experts have accepted for

the purposes of the Phase II hearings only, the burden of proof by clear and convincing evidence placed upon them to establish the percentage of permissible expenditures for which they may charge Agency Fee Payors (the establishment of 19 percent as such permissible expenditures and of 81 percent as nonpermissible charges). The Defendants have also accepted the holding that the record-keeping and bookkeeping methods of the Defendants before the filing of the Original Report were not adequate to enable them in a number of instances to meet the required burden of proof by clear and convincing evidence, and generally accepted the method of calculations used by the Special Master in reaching the results in the Original Report.

It is recognized that the 19 percent of permissible expenditures (and 81 percent of nonpermissible expenditures) continue in effect until the Defendants are able to meet their burden of proof by clear and convincing evidence that other percentages are appropriate.

Indeed, as already observed, the primary purpose of the Defendants in seeking and obtaining the re-reference to the Special Master was to seek to establish by new procedures for obtaining data, of record-keeping and bookkeeping, new percentages of permissible and nonpermissible expenditures.

To this end, the Defendants employed and used as expert witnesses Dr. Edward C. Bryant, Harvey J. Nuland, and Dr. Emanuel Saxe. The Plaintiffs employed and used as expert witnesses Dr. Bruce W. Hamilton, Dr. David F. Hawkins and Dr. Charles R. Mann. They are all distinguished experts in their fields. Their distinctions and qualifications will later be refererd to when their testimony is considered in this Supplemental Report.

The experts for the Defendants, for the most part, used the terminology "retainable" rather than "permis-

sible" as used in the Original Report and the word "nonretainable" as the equivalent of "nonpermissible" used in the Original Report.

B. *The Testimony*

1. *Dr. Edward C. Bryant*

Dr. Bryant received his Ph.D. Degree in Statistics with specialty in sample design from Iowa State University, which he studied under Professors H. O. Hartley and R. J. Jessen. He is the co-founder and Chairman of the Board of Directors of Westat, Inc., on employee-owned research corporation with headquarters outside Washington, D.C., near Rockville, Maryland.

Dr. Bryant has had over thirty years of experience in statistical research, consulting, teaching and application of statistical methodology and the direction and administration of research in a number of important fields. His field of specialty is survey design. He has been responsible for or has participated in the design of numerous national, regional and local probability samples. His principal contribution to the theory of sample design has been his work on multiway stratifications designs.

Dr. Bryant is a fellow of the American Statistical Association. He has been a member-at-large of the Council of that organization as well as President of the Washington Statistical Society. He is also a member of several other related societies and organizations.

He has written extensively including "Statistical Analyses," second editor McGraw-Hill Book Company, New York, 1965, and is the author or co-author of some eighteen selected articles in regard to subjects related to his expertise.

He has participated as an expert in a number of cases in various courts, commissions and agencies, and is obviously well-qualified as an expert witness in his field.

The Special Master found Dr. Bryant to be a knowledgeable and impressive witness. In addition to his clear grasp of the elements involved in his field of expertise, the Special Master found that Dr. Bryant is a truthful, careful witness and is a person of integrity.

Westat, Inc., incorporated in 1963, is an impressive organization. It has a permanent staff of more than 240 persons who possess the necessary technical and managerial skills to design and direct major large-scale research efforts for agencies of the United States Government as well as a broad range of institutional and business clients. Westat, Inc. has become one of the leading survey research organizations in the United States.

In his testimony, Dr. Bryant described his employment by the Defendants as follows:

> I was retained to develop a system of time recording which would be capable of producing estimates of retainable, nonretainable and administrative time for the employees of CWA; and as a part of that assignment to look into the feasibility of collecting the necessary data by sampling procedures, and if in my judgment this turned out to be feasible, to develop the forms and do some pretesting of the data collections.

Pursuant to this employment, Dr. Bryant prepared a report, dated April 24, 1981, and entitled: "Report on the Design of a Sampling System to Provide the Basis for Allocating Retainable and Nonretainable Union Expenses to Objecting Agency Fee Payers," (hereinafter the "Westat Report"). This Report was admitted into evidence and will now be described more fully.

As described by Dr. Bryant in his testimony, the Westat Report indicates a system for recording the time of the CWA Staff for each district and headquarters de-

partment in order to determine the amount of time spent on retainable and nonretainable activity, with a division of time for the Secretary-Treasurers Department into "Retainable," "Nonretainable" and "Administrative."

a. *Descriptive Categories of CWA Activities and their Allocations*

Counsel for CWA supplied Dr. Bryant with a list of 25 descriptive categories of the activities of CWA. In Phase I, the 21 activities used in the Beans Report had been taken from the Answers of the CWA Defendants to the Plaintiff's First Amended Interrogatories. This list of 21 activities appears as Appendix B attached to the Original Report and are summarized in Note 5 appearing on page 17 of the Original Report.

The list of 25 categories of activities supplied to Dr. Bryant appears on Attachment E-5 to the Westat Report. This list is a refinement of the 21 activities list and contains a classification "25 Other" which is to be used when the activity does not fit into the other 24 activities and may be used for possible changes in CWA functions in the future.[1]

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[1] The list in the Original Report read: 1. Grievance up to arbitration; 2. Arbitration; 3. Administration of collective bargaining agreement; 4. Preparation and negotiation; 5. Organizing; 6. Conducting Union meetings; 7. Labor legislation; 8. Strike and picket activity; 9. Recreation and social activities; 10. Retirement, etc.; 11. Training; 12. Publications; 13. Political activities; 14. Presentation of Court activities; 15 Defense of Court activities; 16. Activities re impr. terms and conditions; 17. Reports and References to Agreements; 18. Monitoring local offices; 19. Community Affairs; 20. C.O.P.E.; and 21. Per Capita Contrib.

The list provided to Dr. Bryant and used in the Westat Report read: 1. Formulating contract proposals, contract negotiations, and contract ratification; 2. Handling questions and complaints about working conditions, benefits and contract rights; 3. Handling grievances and arbitrations; 4. Other meetings, phone calls, etc. with company representatives; 5. Reading or discussing background information and news related to wages, working conditions, etc.;

Dr. Bryant testified that the list of 25 categories was "reasonably comprehensive." He also stated that: "We were worried about the Other category, but it appeared that there was not another classification of activities not included in the system but that those hours changed as Other could really have been classified in other ways."

In the Westat Report, the 25 descriptive categories are allocated to five major categories, i.e., 1. Retainable; 2. Other retainable; 3. Administrative; 4. Allocable; and 5. Nonretainable. Generally, this allocation follows the findings by the Special Master in the Original Report. Using the numbers in the list of 25 categories in Note 1, numbers 1, 2, 3, 4, 5, 6, 7, 8 and 9 are placed under "1. Retainable." This allocation is based upon the theory that the Special Master in the Original Report held that CWA had met its burden of proof that these 9 categories were retainable.

Under the heading "2. Other retainable," were placed "15. Organizing" and "23. Public relations." The Special Master, in the Original Report, held that on the record presented to him these activities were nonretainable. CWA, however, takes the position that they are retainable and these are classified separtely as "2. Other retainable "so that, if upon final judicial determination, they may be placed in either the retainable or nonretainable category without difficulty for the purposes of the mechanical operation of the Westat system.

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6. Government agency, board or regulatory body matters; 7. Demonstrations, leafletting, strikes about CWA wages, working conditions, etc.; 8. Steward meetings or training; 9. CWA schools; 10. CWA conventions or monthly, area, etc. meetings; 11. CWA local union meetings; 12. Local union administration; 13. Office management and administration; 14. Meetings or conventions of other labor organizations; 15. Organizing; 16. Legislative activities; 17. Registration and get out the vote activity; 18. COPE fundraising; 19. Other political activity; 20. Community service activity; 21. Time off-e.g., sick time, vacation; 22. CWA publications; 23. Public relations; 24. International affairs; 25. Other.

Under "3. Administrative" are placed numbers 10, 11, 12 and 13. The allocation of time in this category as between retainable and nonretainable is to be on the basis of the allocation of the nonadministrative time of each district or department. For example, if 60 percent of a district's nonadministrative time were retainable and 40 percent nonretainable, its administrative time would be allocated on the 60-40 division. It should be noted that the 13 times considered as "Administrative Expense" on pages 31 to 36 of the Original Report have been either consolidated in numbers 10, 11, 12 and 13 or reallocated to other numbers. It should also be observed that there is no category "Legal" as there was in the Oriignal Report (pages 26 and 33). Legal expenses are a part of various categories in the list of 25 categories.

Under "4. Allocable" are placed numbers 6, 16, 20, 22 and 25. These categories involved activities in which CWA will seek to establish under the guidelines in the Original Report what portions, if any, would be retainable or nonretainable. It will contend that if the portion of the activity is work-related as directly related to the working lives of CWA represented employees, it would be retainable; if, however, the portion of the activity is citizen-related to the everyday lives of CWA represented employees, it would be nonretainable.

Under "5. Nonretainable" are placed numbers 14, 17, 18, 19 and 24 which were held nonretainable in the Original Report.

b. *The Westat System*

Dr. Bryant, in his testimony, described the Westat data collection and sampling system as having five component parts, i.e., (1) construction of the sample, (2) design of the instruments and instructions, (3) pretest of the system, (4) implementation of the system, and (5) monitoring of the system.

(1) *Construction of the Sample*

Dr. Bryant concluded that a sample over time would be appropriate. He therefore designed a sampling plan on the basis of the data provided by CWA's four-month study. This four-month study was begun by CWA on December 1, 1980 by the use by its officers and employees of daily activity logs indicating the amounts of time spent by them on each of 25 identified activities. As of the time of the preparation of the Westat Report, all of the data from the daily activity logs had not been summarized, but at the last tabulations as of that time 114,992 hours were covered, excluding sick leave, vacation and other time off. Some daily logs were missing after March 15, 1981, but it was estimated by Westat that between 85 and 90 percent of the manhours worked were in the data base. In the Westat Report, it was noted that four months of data do not provide an adequate base for distributing costs because of the controversy in regard to whether some of the identified activities are retainable or nonretainable, and more importantly, the four-month period of data cannot be presumed to be representative of any time interval (other than itself) and therefore does not provide an adequate basis for allocating either past or future costs. Such collected data, however, in the opinion of Westat, does provide a satisfactory basis for a sample design, assuming reasonably that the variation observed during the 15 weeks for which usable data were collected is typical of the variation one could expect during successive sampled weeks in the data collection plan with some adjustment for some headquarters functional units.

Dr. Bryant derived an estimate of sampling error of within 2 percentage points of the correct estimates, with odds 19 to 1, which in his opinion is "on the conservative side." He then recommended a sampling schedule, noting that the data provided by the study were "more

extensive than the amount of data the sample designer usually has available to him." The error for the entire system appears in "Attachment C" to the Westat Report.

(2) *Design of the Instruments and Instructions*

The initial draft of the reporting form was prepared by Dr. Bryant. That original draft was given to the experts at Westat for rearrangement and competition. Two forms of Activity Reports are in Attachment F of the Westat Report, a blank form as F-1 and a form completed by an employee as F-2.[2] The Activity Reports filed with the Westat Report describe the activity involved, allocated under categories I, II, III and IV with blank boxes to be checked by the employee of CWA if applicable. It has a space for the date, name and social security number of the employee, with a space to indicate the number of hours spent under each category.

Also attached to the Westat Report as E-1 is a letter from President Watts to All Officers and Staff, dated December 22, 1980 in regard to the new Daily Activity Logs forms and instructions in regard to its use, and with a reminder that the forms be completed "completely and accurately."

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[2] In the Defendants' Supplemental Hearing Brief, page 31, is a sample of a completed form which contains the same basic material in the forms F-1 and F-2 of the Westat Report, but is somewhat different from those forms. The Special Master ruled in his Order of August 13, 1981 that material in that Brief as well as Appendices C, D and E filed with that Brief would not be struck out as moved by the Plaintiffs, but would not be considered as new evidence in the case or part of the record made in the case by testimony and exhibits and closed on June 22, 1981, but could be used by the Defendants in their argument for illustrative purposes. The Special Master considers the sample of the form on page 31 of the Defendants' Brief as illustrative of the further development of the reporting form.

In addition, a form of instructions in regard to the Officers and Staff Daily Activity Log (E-2), a list of the 25 categories (E-5) and a form of completed Daily Activity Logs (E-6 and E-7).

(3) *Pretest of the System*

Dr. Bryant indicated in his testimony that pretesting was necessary to find out what is wrong with the proposed system and to perfect the forms. This was done by Westat and as a result certain minor changes would likely be made, but in his opinion the basis structure would not change.

(4) *Implementation of the System*

Dr. Bryant stated in his testimony that revised forms, instructions and list of categories were sent to various employees during the time frame previously mentioned, and a study made by Mr. DiGaetano of Westat, with a check by Dr. Bryant on a thumb-through basis. The responses in District 10 were included because of the substantial number of responses to the category called "Other," considered to be a possible overuse of that category, like resulting from a misunderstanding of some items. There was disclosed a misclassification of travel time to the "Other" category rather than to the category for which the travel time was conducted.

Dr. Bryant also indicated that the forms and instructions would be revised to a minor, but not substantial, extent.[3]

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[3] This was done and the revised forms and instructions are included in Appendix C filed with the Brief of the Defendants, as well as a Practice Report and Schedule for filing Activity Reports. In Appendix D filed with the Defendants' Brief is a verbatim transcription of a meeting of the CWA Staff in the Sheraton-Boston Hotel, Independence Ball Room, Boston, Massachusetts, on July 4, 1981 at 10:00 a.m. at which the members of the CWA Staff were addressed by President Watts who reviewed the background of the

(5) *Monitoring the System*

In his testimony, Dr. Bryant stresesd that monitoring the system was "extremely important." He recommended that an employee of CWA would originally monitor the distribution of the forms and instructions and should answer questions which arose in the field about the handling of special situations. This was done by Patsy Fryman, assistant to President Watts. Dr. Bryant also indicated that there should also be a monitor from an outside organization, not only for the four-month period but on a continuing basis.[4]

The Westat Report on page 3 also stressed that it recommends "A monitoring system which would provide professional oversight of adherence to the data collec-

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case with particular reference to the Original Report and the necessity for improved methods of data collection and accounting methods. He stressed forcefully the importance of the new system and diligent and accurate information being supplied and that making the system work was part of their job and, further, that any failure on their part would be considered a serious default and treated as such. He then turned the meeting over to Ralph DiGaetano, who gave a full explanation of the revised forms and reporting system which was to begin on August 1, 1981. Forms of Activity Reports were distributed to be filled in by the Staff Members for a typical day. Questions from the floor were also answered.

Appendix E filed with the Defendants' Brief contains a copy of a letter from President Watts to all CWA Vice Presidents in regard to the New Staff Activity Reports with lists of Persons in the Districts Delegated to Coordinate Activity Reports and lists of Staff Members for the respective 12 districts with spaces for check marks opposite these names for the seven days of the weekly periods when reports are to be made. These Staff Activity Reports are to be returned to Patsy Fryman, assistant to President Watts. For the reasons stated in Note 2, *supra*, these revised and other materials are not part of the record and only represent illustrations of the type of revisions and procedures possibly intended by Dr. Bryant.

[4] In the Defendants' Brief it is stated that Westat has been selected as the outside organization to do the monitoring. Here again, this is not part of the record but is illustrative of the type of monitoring which could be established on a continuing basis.

tion plan and interviewing of employees on a sample basis. These monitoring services should be provided by an outside organization. . . ."

2. *Harvey J. Nuland*

The second expert witness who testified for the Defendants was Harvey J. Nuland, a Certified Public Accountant, who has engaged in public accounting for some thirty years. Most of the thirty years of practice has been with Buchbinder, Stein, Tunick & Platkin ("Buchbinder, Stein"), a firm of certified public accountants with offices in New York City. Most of Mr. Nuland's experience has been with nonprofit organizations. Much of Buchbinder, Stein's practice has been with labor union's, and Mr. Nuland primarily spends his time dealing with them. The Special Master found that Mr. Nuland was a knowledgeable, frank and truthful witness.

Mr. Nuland was employed by counsel for the CWA Defendants in October, 1980 to testify as an expert witness in the case. He describes the scope of his employment as follows:

> I was retained to recommend a system of apportionment that would distribute or categorize CWA's expenditures into specific categories: namely, retainable and nonretainable expenses. At the same time, I was asked to assist in obtaining other experts in this matter.

Nuland I

He prepared for Buchbinder, Stein a report entitled "Communications Workers of America AFL-CIO, Report on Design of Expense Allocation System," which was presented to the Special Master and to counsel for the Plaintiffs on May 1, 1981. This Report was admitted into evidence on June 16, 1981 as Defendants' Exhibit No. 5 and will hereinafter be referred to as "Nuland I." There-

after, he prepared a second report with the designation "Communications Workers of America AFL-CIO, Report on Design of Expense Apportionment System" which was filed and admitted into evidence on June 16, 1981 at Defendants' Exhibit No. 7. The second report will hereinafter be referred to as "Nuland II." It contains several differences from Nuland I.

Nuland I recites in its Introduction that Buchbinder, Stein has reviewed the Original Report and found that it indicated:

1. Some categories of CWA expenditures are directly attributable to retainable and non-retainable classifications without need for additional allocation. For example, negotiation expenses are retainable, while expenses for foreign affairs are non-retainable.

2. Allocations made in some categories are accepted by the Master as valid. For example, expenses for the CWA *News* and CWA *Newsletter* are allocated based upon an analysis of their content.

3. Those categories identified as administrative expenses are allocated between retainable and non-retainable classifications on the basis of the percentage resulting from the division of all other expenses.

4. For some categories, the Report indicated a need for an additional system of allocation. Without such a system, these expenses are classified as non-retainable.

Nuland I also noted that the Original Report suggests that the Statement of Position 78-10 of the Accounting Standards Division of the American Institute of Certified Public Accountants entitled "Accounting Principles and Reporting Practices for Certain Non-profit Organiza-

tions" gives "guidelines for the steps a non-profit organization should take in determining the cost or expense by function."

Nuland I then quotes paragraphs 98 to 100 of the Statement of Position 79-10 and from Appendix B attached to that Statement giving illustrations of how the allocation procedures operate in practice. It also notes that the Defense Production Act Amendments of 1970 established a Cost Accounting Standards Book which had promulgated Standards that provide criteria by which items of cost can be assigned to one or more cost objectives, both on a direct basis and on an allocation basis for indirect costs.

In considering the design of a system that would meet the standards set forth in the Original Report, Buchbinder, Stein reviewed the audited financial statements of CWA, its accounting records and underlying system for collecting, classifying and recording expenses to determine whether the procedures used would provide reasonable assurance that the expenditures are categorized in a way that accurately reflects the CWA expenditures.

Nuland I then reviews the existing CWA accounting system's provisions for the classification of CWA expenditures into functional categories by district, national unit and headquarters departments, supported by object classifications detailing the expenditures covered. The opinion is expressed that the accounting records present an accurate analysis and summarization of operations into program services and support services. The major account classifications are then set forth. Under the heading "Functional Classifications," Direct, National Units, and Departments, are listed 23 classifications taken principally from those used in the Beans Report mentioned in the Original Report; under the heading "Object Classifications," Payroll and Personnel Related Costs, are listed 13 items of Salaries, Pensions, Taxes, Staff Moves, Staff Illnesses and Absences, and the like; and under "Other

Expenses" are listed 13 items such as Printing, Rent, Maintenance of Building, and the like.

In addition, attention is called to expenses charged to seven Special Funds including the Defense Fund, the Organizing Fund and other special funds. Attention is also called to a series of accounts to record expenses for special projects that may occur from time to time. The opinion in Nuland I is expressed that the CWA "record-keeping system provides an accurate base for an allocation procedure, for those expenses requiring additional allocation, that meets the requirements of generally accepted accounting practices."

Next, Nuland I describes the "System Design" which "will provide the basis for the outline of a system which will accurately distribute CWA expenditures by specific categories." It was observed that certain departments performed single functions, easily identifiable, and which require no additional allocation. By the Original Report they are either completely retainable [5] or completely non-retainable.[6] In addition, there are multiple functions performed by certain departments, districts, and national units which require allocation in order to divide retainable from non-retainable expenditures. The Original Report indicated an appropriate allocation system in regard to some of the items [7] wherein the Original Report suggested that allocation between retainable and nonretain-

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[5] Completely retainable includes Negotiations, Development and Research, Collective Bargaining Policy Committee, Contracts Reports and Ratifications Fund and Professional (auditing, actuarial and other nonlegal fees).

[6] Completely nonretainable includes Direct Political Expenditures, Community Services, Foreign Affairs, Affiliation Fees and Organizing Expenditures.

[7] Such as CWA *News* and CWA *Newsletter* based on an analysis of their content; education expenditures based on the project codes and billings; and, committees and conferences based on the nature of the committee or conference.

able might be determined by an analysis of the functions performed by the personnel involved, but for which no sufficient data base was produced to meet CWA's burden of proof.

Nuland I also stated that in order to provide the initial basis for selecting and designing appropriate allocation methods CWA began on December 1, 1980 "an intensive study of the functions performed by its officers and professional staff." The study covered the four-month period from December 1, 1980 through March 31, 1981.

In December, 1980 two forms of Daily Activities Log were used. The first form divided the day into hourly segments, 8:00-9:00 a.m. through 6:00 p.m. The second form divided the day into half-hourly segments. Both forms were accompanied by printed instructions for their use and on the back of each form there were 25 category numbers, 1-25, with a description of the category following each number. These 25 categories are substantially the same as those listed in Note 1, page 11, *supra*. There are spaces for entry of the date, name of employee, district number, title or headquarters department and a space in which the employee enters the category number for the number of hours of work reported.

The third form which in January, 1981 and thereafter, is in effect, a refinement of the prior two forms. It includes a space for the employee's social security number which the accompanying letter of December 22, 1980 from President Watts indicated was "for computer coding." In the letter of December 22, 1980, President Watts called the employees' attention to certain "important reminders" for compliance with the instructions and stated that ". . . it is necessary that you continue to complete these forms carefully and accurately."

The three forms mentioned above were attached to Nuland I as Exhibits 1, 2 and 3, respectively. Samples of the format in which the data will be compiled and

summarized are attached to Nuland I as Exhibit 4. This Data Processing Summary of Daily Activities shows the date, district or department number and the number of the category, the activity description, the name of the employee, the employee's social security number, the employee's title, the date the work was performed, and the number of hours.

In its conclusion, Nuland I states:

> *When* the four-month survey is complete, the information generated by it *will provide* the data for establishing a base for an allocation system for CWA consistent with generally accepted accounting practices. The information *will also provide* a basis for a sampling system designed in accordance with generally accepted principles of statistical sampling. The system will test the continued reliability of the allocation system on a periodic basis and allow for adjustments in allocations to compensate for future changes in union policies and activities.
>
> This report completes the *preliminary stage* in the design of a comprehensive system for the allocation of the operating expenses of the Communications Workers of America, AFL-CIO. Upon completion of the data collection described in the report, specific allocation formulas *will be developed*, and the system of statistical sampling *will then be formulated.* (emphasis supplied.)

Nuland II

Nuland II under "General Comments" states the following:

> This report completes the second stage in our retention by Counsel to the Communications Workers of America, AFL-CIO, to assist in the design and implementation of a system to provide an accurate distribution of the Union's expenditures by specific

category. It presents CWA's expense classification system and recommends a basis for the apportionment of expenditures. For the purposes of this report, apportionment means the division of expenditures between those which are retainable and those which are non-retainable under the Special Master's August Report.

In preparing our initial report and in completing this report, we reviewed the audited financial statements of CWA, their accounting records, and the underlying system for collecting, classifying and recording expenses to determine whether the procedures used provide reasonable assurance that the expenditures are categorized in a way which accurately reflects the Union's operations. CWA's accounting system provides for the classification of expenses into functional categories by executive office, district, national unit, and headquarters departments supported by object expense classifications which detail the expenditures in each functional classification. This provides a set of accounting records that permit an accurate analysis and summarization of operations into program services and support services. As we indicated in our initial report, we are satisfied that the CWA record-keeping system provides an accurate base for apportionment that meets the requirements of generally accepted accounting practices.

CWA's computerized accounting system provides comprehensive records of the components of each expense classification. The Union's system of internal control and procedure for coding assure accurate classification of transactions. Further, the accounting system permits detailed analysis for each account for apportionment purposes.

The apportionment system recommended by this report relies on the categories of accounts used in the

normal business operations of the union for financial reporting and budget making. Each of the major categories of accounts and each object expense classification which breaks down the major categories of expenditures in greater detail are reviewed. Detailed apportionment methods which meet generally accepted accounting practices are recommended for each expense classification.

The report is presented in two sections. The first reviews the six basic apportionment methods recommended. The second presents our recommendations, account by account.

Then follows the first section under the heading "Basic Apportionment Methods." The six basic recommended methods of apportionment are as follows:

a. *Time Record Sampling Method*

The major accounts are:

(1) The administrative operations account under the President's office (account 024);

(2) The finance and office operations account under the Secretary-Treasurer's office (account 025);

(3) The operations of the three Executive Vice Presidents (accounts 085, 086 and 087);

(4) The four national bargaining units (accounts 016, 017, 018 and 021);

(5) The headquarters departments (accounts 020, 022, 023, 026, 027, 029, 035 and 045); and

(6) The 12 districts (accounts 001 through 012).

The wage, salary and related expenditures in these accounts would be proportioned on the basis of the Westat study.

b. *Non-differential Costs of the Salaries of the Elected Executive Board Members*

There are 17 elected members of the Executive Board as provided in the CWA Constitution, i.e., the President (1), the Secretary-Treasurer (1), the three Executive Vice Presidents (3), and the Vice Presidents of the Districts (12). It is stated in Nuland II that there are "inescapable, non-differential costs, which must be incurred by the Union, are fundamental to operations, and do not vary in relation to secondary activities" and "are not appropriate for apportionment and do not require additional record-keeping."

c. *Direct Identification as Exclusively Retainable or Non-retainable*

These accounts are directly identified as containing exclusively retainable or non-retainable expenditures and do not require additional apportionment or record-keeping. Examples are: account 030, "Contributions," as exclusively non-retainable and account 043, "Bargaining Councils," exclusively retainable.

d. *Direct Apportionment*

These accounts should be apportioned between retainable and non-retainable expenditures by a specific system of apportionment peculiar to those accounts. For example, account 031, "Legal," should be apportioned on the analysis of the project codes and billings; account 035, "CWA News," should be divided into two parts, i.e., 1) the salary and expenses of the Editor apportioned on the basis of the Westat study, and 2) the remaining portions of the account on the analysis of content.

e. *Redistribution*

Several accounts contain expenditures which should be redistributed to the executive offices, departments, national units or districts to which they relate. Then,

apportionment should follow the results in the Westat study for the functional classifications for which they are distributed. The example given is account 036, "Pension Fund Expenditures," which should be distributed in direct proportion to salary distribution.

f. *Administrative Expenditures*

A number of accounts contain general administrative expenditures which are attributable to the entry CWA organization and should be apportioned according to the division between retainable and non-retainable expenditures. As examples are account 032, "Convention and Related Committees," and account 033, "Executive Board."

Then follows an "Account-by-Account Recommendation" divided into two subsections: "A. Redistribution and Apportionment of Object Expense Classifications" and giving the expense code number, the expenses used and the recommended method of redistribution or apportionment. Later, account numbers, the nature of the account and the recommended method of redistribution or apportionment.

Recommended Apportionment Methods by Major Accounts

There are 35 account numbers given, from account numbers 1-12, expenses for "Districts 1-12" to account 099, "District Organizing."

Several of the recommended methods of redistribution or apportionment will be later referred to in this Supplemental Report.

Nuland II concludes with the following statement:

> This report completes a review of the CWA accounting system and includes recommendations which, when implemented in conjunction with the recommendations for a time sampling method meeting generally accepted statistical sampling practices be-

ing developed by WESTAT, INC., will provide CWA with an apportionment system which meets generally accepted accounting practices. We are available to discuss the report at your convenience.

Mr. Nuland prepared two helpful charts, one of which is entitled "Communications Workers of America, AFL-CIO, Expense Apportionment System, Major Accounts Apportioned by Time and Activity Codes, Study Methods 1, 2 and 5," admitted into evidence as and filed herewith as "Supplemental Report Exhibit No. 3" and the other chart is entitled "Communications Workers of America, AFL-CIO, Expense Apportionment System, Other Major Accounts, Methods 3, 4 and 6," admitted into evidence as Defendants' Exhibit No. 10 and filed herewith as "Supplemental Report Exhibit No. 4."

Mr. Nuland, in his testimony, made it clear that the decisions made on an annual basis as to what was retainable and what non-retainable would be made by "the accounting department of CWA or such people as are assigned to it and based upon whatever information was available to them or whatever information they had to develop to place them first into those categories." He made it clear also that he was only "retained to develop the system. I have no other connections with CWA" and that he would not audit the data provided by the Westat Report.

Mr. Nuland furher stated in his testimony that "generally accepted accounting principles do not apply to this method or any costing method."

Mr. Nuland also testified that he recommended that the salaries of the 17 elected Executive Board members of CWA, whose salaries are fixed by the CWA Constitution,[8] are to be considered as retainable and not subject

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[8] The Constitution of CWA, as amended June, 1980 (Defendants' Exhibit No. 8), provides in Article IX, page 6, that the Executive Board staff consists of the President (1), the Executive Vice Presi-

to apportionment between retainable and non-retainable. This recommendation was based upon the theory that because of their election, regardless of the functions performed by them, the costs were "inescapable, unavoidable costs that must be incurred by the organizations; their salaries are set by the Conventions; the Constitution sets forth the position and duties of the position, and, therefore, their salary costs are allocated directly to the operation."

3. *Dr. Emanuel Saxe*

The third and last expert who testified for the Defendants was Dr. Emanuel Saxe. Dr. Saxe is a Certified Accountant and has been a professor of accounting for over 35 years at the School of Business and Public Administration of the City College of New York, which later became Bernard M. Baruch College. He is also a member of the New York Bar. He has received many degrees, honors and distinctions. Among them are: Ph.D. and J.D. Degrees from New York University, B.S. Degree in Social Science (cum laude) College of the City of New York. He has also received honorary Doctors' Degrees from Pace University and City University of New York He has been a member of the New York State Board of Public Accounting and has served as vice president of the New York State Society of Certified Public Accountants as a member of its Board of Directors and Executive Committee. For a number of years, he was Editor of "The New York Certified Public Accountant," the official origin of The New York State Society of CPAs. With S.B. Tunick, he published a book "Fundamental Accounting—Theory and Practice," now in its fourth printing, and has engaged in a number of research studies. His

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dents (3), the Secretary-Treasurer (1) and the Vice Presidents (12 one for each of the 12 districts, a total of 17 members of the Executive Board).

colleagues, alumni and friends in 1972 established an Endowed Chair at Baruch College entitled "The Emanuel Saxe Distinguished Professorship" and a series of lectures entitled "Emanuel Saxe Distinguished Lectures in Accounting" was endowed by colleagues and alumni in 1973.

The Special Master found Dr. Saxe to be thoroughly qualified as an expert witness and to be truthful, frank and an attractive witness.

Dr. Saxe was retained by counsel for CWA to testify as an expert in the present case. He described the scope of his employment as follows:

> . . . I was retained to review the reports that were to be filed by the firm of Buchbinder, Stein, Tunick & Platkin, to determine their compliance with accepted cost accounting standards, and, on the basis of that, thereafter to devise a program based on these standards which, when applied to audited financials of CWA would yield data that would disclose the amount of retainable expense versus non-retainable expense.

Dr. Saxe prepared a report entitled "Communications Workers of America, AFL-CIO, Format for Computation of Retainable Expenses," admitted into evidence as Defendants' Exhibit No. 12, and hereinafter referred to as "Saxe Format Report." It consiste of Schedules I, II, IIa and III and a "Summary Schedule."

Schedule I consists of 13 headings running horizontally across a long page and three vertical headings, under the caption "Basis for Distribution"; "Districts"; "National Bargaining Units" and "Departments"; with appropriate account numbers, under that heading, for each item mentioned.

In his testimony, Dr. Saxe indicated the Saxe Format Report would be completed each year, audited and cer-

tified under standards developed by the American Institute of Certified Public Accountants (AICPA), and would set out first CWA's expenditures for retainable activities and, second, for non-retainable activities as defined in the present case. It would use figures on the amount of staff time spent on retainable and non-retainable activity for each executive office, national bargaining unit, headquarters and regional district, as certified by Westat.

It will be noted that Dr. Saxe shares the opinion expressed in Nuland I and Nuland II, and by Mr. Nuland in his testimony that the salaries of the 17 elected officers of CWA who make up its Executive Board should not be apportioned and are all retainable. Dr. Saxe bases his opinion on the fact that their offices are set forth in the CWA Constitution, they are elected, they have unlimited powers and responsibilities and "upon them rests the work of the organization." There is no "necessary relationship between the exercise of their duties and the time it takes." Then too, Dr. Saxe stated, they are "topflight people; they are unique. Their pay would go on if they were all and I think under those circumstances it would be rather ridiculous to ask them to keep time records." Dr. Saxe admits, however, that some accountants would consider such salaries to be overall administrative expenses, but he does not agree with them.

Schedule II is a refinement of Schedule I with substantially the same vertical subdivisions, except that account 025 is subdivided into A, B and C, but with 14 different horizontal classifications. Schedule IIa is entitled "Redistribution of Individual Sub Accounts included in Account 025." There are five horizontal subdivisions for the redistributable portion of Department Expenses (25B) from Schedule II under 1410, Rental of Equipment, 1420, Maintenance of Equipment, 1440, Telephone and Telegraph, 1500 and 1582, Rent and Occupying Expense—Office, and a subdivision for a Total of Columns 1-4. Then follows a "Redistribuation to the following accounts on the basis indicated for accounts 20-29, 35, 45, and 85-87.

Schedule III is divided into two subdivisions: 1) Expenses either Fully Retainable or Non-retainable, and 2) Expenses Apportioned as Retainable, Nonretainable or Apportioned as Overall Administrative Expense. Vertically, under the heading "Account Number" are listed the various applicable account numbers. Horizontally, there are five hearings: "Total Dollars," "Dollars Retainable," "Dollars Non-retainable," Dollars Apportioned as Overall Administrative Expense" and "Basis for Apportionment."

The totals of Schedules I, II and III are transferred to the "Summary Schedule" where the subtotals and percentages are calculated, with the addition of Overall Administration Expense (from Schedule III) apportioned on the basis of Retainable and Non-retainable Dollars in Subtotals, and then with the Grand Totals of the dollar amounts. The Summary Schedule contains a Note to the effect that it is assumed that the balance in account 040 (Contingencies) will have been redistributed to and incorporated in all applicable related costs prior to completion of the Schedules.

Dr. Saxe, in his testimony, carefully and helpfully explained each item in the Saxe Format Report to the Special Master. He also testified that the Saxe Format Report when properly completed by an independent certified public accountant could be incorporated in a special purpose report, to which should be attached an unqualified opinion by the attesting accountant "to the effect that the data therein have been compiled in accordance with the rules respecting retainable and non-retainable expenses, as laid down by the Court in this case, and also that they are in conformity entirely with the audited financials from which it is drawn." In Dr. Saxe's opinion, such a Special Purpose Report would be entitled to acceptance by third parties.

Dr. Saxe, on cross-examination, indicated that, although well-qualified, independent certified public accountants

were all bound by and followed established general accounting principles, they could—and did—differ in regard to the application of those principles when considering special situations. He also indicated that he would accept the data and other matters contained in the Westat Report with examination by him and that he had not run any figures of the CWA annual financial system through the Saxe Format Report.

The opinions of the experts produced by the Plaintiffs disagreed with several of the opinions of the experts who testified on behalf of the CWA Defendants. The testimony of the Plaintiffs' experts will now be considered.

4. *Dr. Bruce W. Hamilton*

Dr. Hamilton, the first expert to testify for the Plaintiffs has impressive credentials. He received his B.A. Degree from Grinnel College and his PhD. Degree from Princeton University. He has had past employment as a Program Analyst with the Federal Bureau of Budget. He has been an Assistant Professor of Political Economy at The Johns Hopkins University and since July, 1978 has been an Associate Professor of Political Economy at that University. Among other courses, he has taught Microeconomics (the theory of markets, production and consumption). One of his regular courses is graduate Microeconomics theory to Ph.D. students. One of the problems that arise in these courses is joint production. He is a member of the Editorial Board of the "Journal of Urban Economics." He has published numerous articles, the most important one so far as the case is concerned, being "Indivisibilities and Inter Transportation Plant Cost: Do They Cause Market Breakdown" in the Journal of Urban Economics of January, 1980. The Special Master found that Dr. Hamilton was a well-qualified, frank and truthful expert witness.

In his testimony, Dr. Hamilton stated that the concept of joint production in economics is "a problem which

arises when a single input is used almost automatically in the production of two outputs of two or more."

To illustrate this, Dr. Hamilton used the standard textbook example of the person who raises sheep who produces mutton, wool and sheep dung. There is no way of producing mutton without having the other two products exist. There is always a question of what to do with them and "if there is no demand you just dispose of them the best you can. How can one determine the cost of producing wool? There exists no way of sorting out what the costs of producing the wool and mutton separately." He further stated that "the most important implication (if the joint production concept when applicable) for microeconomic theory is that there is no unimpeachable way to assign costs to a given product."

Dr. Hamilton was supplied copies of Plaintiffs' Exhibits Nos. 1540, 1536, 1539, 1544, 1548, 1557, 1559, 1560 and 1561, being completed Daily Activity Logs, for examination in the light of the joint production concept. Most of the Exhibits involved trips for more than one purpose. Exhibit 1540 involved an airplane trip from Washington to Miami and back to (1) attend a CWA Ways and Means Committee meeting, and (2) an AFL-CIO meeting. The first purpose would be at least partially retainable, the second, non-retainable. Dr. Hamilton concluded from his study of the Exhibits that there would likely exist "many examples of joint products for which it is impossible to assign the use of input to one particular output."

After considering Nuland II in regard to the apportionment of the salaries of Executive Officers, Dr. Hamilton was of the opinion that "there are some activities of the Executive Officers that can be assigned to the retainable and non-retainable classification, but that under the joint production theory 'any assignment of that officer's salary between the categories is arbitrary' . . . ."

On cross-examination, Dr. Hamilton agreed that economic theory recognizes that these are joint costs but does not provide "an unimpeachable means of allocation such costs" and further, that economic theory cannot "provide an assurance of how the various joint costs in this case should be allocated."

5. *Dr. David F. Hawkins*

The second expert witness who testified for the Plaintiffs was Dr. David F. Hawkins.

Dr. Hawkins also has impressive credentials as an expert witness. He received his B.A. Degree from Harvard University in 1956, his Master of Business Administration Degree (cum laude) from the Harvard Business School in 1958 and his Doctorate of Business Administration Degree (with distinction) also from the Harvard Business School in 1962.

He began as a Research Assistant at the Harvard Business School in 1961, became Assistant Professor in 1962, Associate Professor in 1967 and full Professor in 1970 until the present time.

Dr. Hawkins has written a book entitled "Corporate Financial Reporting: Text and Cases" which has been through two editions (the second being the Revised Edition), and Dr. Hawkins is about to prepare a third edition. It is considered to be one of the leading textbooks in the field of an advanced nature and has been used at some 600 schools at one time or another.

He has received several special honors and awards including the Newcomen Society Award, the McKinsey Award and the Graham & Dodd Scroll Award. He has also been and now is a member of the Financial Accounting Standards Advisory Council which gives advice to the Financial Accounting Standards Book, he being presently on the important committee on agenda.

Dr. Hawkins had written scme 64 publications, articles and bulletins, has written nine books and monographs (same in collaboration with others) and including "Corporate Financial Reporting: Text and Cases" already mentioned, and has contributed to 18 other books and monographs including "A Case Book in Social Work Administration (New York Council of Social Work Education) 1970, edited by Harry A. Schatz. He has also acted as a consultant to the General Electric Company, Honeywell, Inc., Alcon, American Express Company, International Paper Company and Miami Coca-Cola Company, involving, in various instances, developing accounting responses to inflation, developing a profit-oriented management control and accounting system for a specific division, and to develop product cost data for decision-making process and inventory evaluation purposes. He has also advised certain nonprofit entities such as the New York Catholic Charity and KLB Child Care Development Center costs of that Center in connection with a grant by an agency of the federal government.

Dr. Hawkins was employed by the Plaintiffs to present expert testimony in this case. In preparation for his testimony, he reviewed the opinion of the Supreme Court of the United States in *Allen*, the Original Report, Nuland I and Nuland II, the deposition of Dr. Saxe and his working papers and the Memorandum and Order of January 16, 1981 re-referring the case back to the Special Master.

In his testimony, Dr. Hawkins gave interesting and helpful explanations in regard to Generally Accepted Accounting Principles, Generally Accepted Audit Standards and Generally Accepted Accounting Practices or Procedures. In commenting on the use generally of these principles, standards and practices in situations in which the relationship between the parties is involuntary, Dr. Hawkins stated:

> It's very hard to think of any circumstances other than the one we're in now with the agency fee payers. It's very hard indeed. In the normal commercial arrangement of people outside the firm, people outside the entity, you have options. If you don't like the accounting, as an investor you can sell the stock. If you don't like the accounting, as a broker you can call the loan or not get involved in the deal in the first place. As a buyer of services or product, you can buy somebody else's.
>
> This does become a concern when you have monopoly situations, however, and there the concern comes when there is dissatisfaction between the person external to the firm whose interests somehow are being touched by the accounting practices of the firm, and they have no option to go anywhere else. Those situations usually end up in the courts, and then the court applies other standards than accounting, such as fairness, reasonableness, social standards, legal standards.
>
> Later Dr. Hawkins testified:
>
> . . . I find it very difficult to come up with examples an involuntary kind of relationship to even approach this situation. In my experience, it's unique.

In Dr. Hawkins' opinion, the data to be obtained from the Daily Activities Logs could not properly be relied upon in making the desired allocations. He noted that in any attempt to audit the reliability of the timekeeping records, auditors do five things, i.e., (1) they observe, (2) they examine documents, (3) they perform financial analyses, (4) they trace documentation, and (5) they test internal controls.

(1) It would be very difficult for an auditor or anyone to observe the filling out of the logs on a continuous basis or even upon a sample basis.

(2) Any review of the logs for completeness, their consistency and the relationship between the activity and the coding would take an enormous amount of time and and is probably not a very feasible auditing approach.

(3) Often accountants compute financial ratios on the financial statement they are examining to see if the financial ratios are in tune with past experience or how they compare with comparable ratios of comparable companies. In this case, however, as Table 4 in the Westat Report indicates, a standard deviation around the means, the 15 weeks, 100 percent census of those who filled out the logs would in some instances be too great for a proper analysis and this is not a possible way to audit.

(4) There is very little documentation other than the logs to observe. Calendars might be observed but they only indicate where the employees were at a particular time. Then too, the Plaintiffs would find it too expensive to become involved in this type of activity.

(5) There are no internal controls relating to the logs, so that the technique of internal controls is not available.

In summary, in regard to the logs, Dr. Hawkins was of the opinion that auditors should use *all* of the five techniques mentioned and this cannot be done. He states: "so at the conceptual level it's difficult, and at the practical level it's difficult in this case, if not impossible."

So far as the Westat Report proposes a system of auditing essentially based on interviewing, it necessarily relies on guesstimates and very poor recollections which the Special Master in the Original Report found to be insufficient for CWA to meet its burden of proof.

Not only is this type of data unauditable but the underlying system itself does not lead to reliable descriptions of how people spend their time. He indicated that from his experience and study, people are resentful of the invasion of their privacy, they are never quite sure of how

the log will be used, they tend to put off filling out the logs and seek to fill them out based on what they suppose would be a "standard" allocation and how long they believe a job "should" take, rather than what it in fact did take. Nor does the time spent fall into predetermined "slots" of various time periods. He does not "have too much faith in a system like this."

In regard to Nuland I and Nuland II, Dr. Hawkins noted that these two reports were to be implemented by the Saxe Format Report and all could be considered together. As an accounting matter, he did not find that these documents were "responsive to the situation at hand." In Dr. Hawkins' opinion, there should be some criteria set up before evaluating such a system, and he saw no such criteria presented in the documents. There was no examination by Mr. Nuland of the costs and he relied on counsel for CWA primarily to tell him what was retainable and non-retainable. Since "counsel is representing one of the antagonists in this operation, that was hardly the source for an unbiased opinion." Much reliance was placed on generalized concepts such as "generally accepted accounting principles" or "generally accepted accounting standards" almost "treating the issue in abstract."

Dr. Hawkins was of the opinion that the approach used was biased toward the CWA interests in at least four regards:

a. In the inclusion of all elected officers in the retainable category, Dr. Hawkins was not impressed with the arguments advanced for this determination and observed that an examination of their activities would likely show that many of their activities are not connected with collective bargaining, contract administration or grievance adjustment. Those officers can, and have, kept time records and should be required to do this. Nor would the placing of these salaries in the administrative classifica-

tion be satisfactory in that by so doing some of the non-retainable activities would end up by being allocated to retainable.

b. Using manhours for the allocation is most unusual. Most cost systems in nonprofit organizations indicated that the cost objective is the basis of allocation.

c. It is generally recognized that cost and activity are much more related in terms of overhead than to individual activity. The base of a system on manhours gives a bias the allocations in favor of CWA.

d. The CWA subsidy to the Districts is a subsidy for use in all the activities of the District and supports all activities. The subsidy to Districts should not be entirely allocated to the retainable category.

In summary on these points, Dr. Hawkins observes:

> . . . the theory that really comes home to me is (that) the system is in the hands of the union, who are less than objective, and in that situation, anything but the most direct sort of approach will probably continue to lead to litigation, and I would favor something that very clearly emphasizes the clear and convincing evidence approach . . . .

Dr. Hawkins stated that in his opinion Nuland I, Nuland II, the Saxe workpapers and the Westat Report do not meet the criteria he had set out.

6. *Dr. Charles R. Mann*

The third and last expert witness who testified for the Plaintiffs was Dr. Charles R. Mann.

Dr. Mann received his B.S. Degree in Applied Mathematics from Polytechnic Institute of Brooklyn, his Masters of Science Degree in Mathematical Statistics from Michigan State University and his Ph.D. Degree in Statistics from the University of Missouri. He taught statistics at the graduate level at George Washington Uni-

versity in Washington, D.C. from 1969 through 1973. In 1977, he formed Charles R. Mann Associates, later incorporated, which has its offices in Washington, D.C. Dr. Mann is a consulting statistician. Between 80 percent and 90 percent of the work of his company has been in connection with equal opportunity work. He has testified as an expert witness in 34 cases, 15 of which were in United States District Court in a number of districts including Maryland.

In his consulting work, Dr. Mann provided consulting in statistical analyses, applied probability, survey design, questionnaire design, mathematical and economic modeling and mathematical statistics. He has published several articles on matters related to statistics.

The Special Master found Dr. Mann to be a competent, objective and truthful witness.

Dr. Mann testified that in his opinion statistical methods cannot provide a fixed definition of retainable and non-retainable expenditures for use in this case and further that if there is a flawed base, statistics cannot overcome the flaws; at best, it can only assume that the flaws cancel out and if this does not occur the statistical results will be in error and there will be a bias that will appear in the results of which the statistician will not be aware.

Dr. Mann examined the Westat Report to determine the explicit or implicit assumptions that were used in that Report. He stated that there were two types of assumptions: (1) application assumptions and (2) mathematical assumptions.

Considering the Application Assumptions, Dr. Mann testified in regard to nine such assumptions, as follows:

a. *Hours sampled should be representative of the hours not sampled*

Some employees were omitted from the study and the time of those employees would have to be represented

by the hours of those employees included in the study. More importantly, the hours sampled would have to be representative of the hours not sampled, for the study to be pertinent.

b. *The variability during the sample period would be representative of future variability*

The Westat Report is based upon a study for a particular period of time so that the variability in the future periods of study to be pertinent must be represented by the variability for the particular time period.

c. *That it is possible to define retainable hours*

This is essential and somewhere along the line, a definition of retainable hours must be obtained.

d. *The systematic sampling of four-week periods will be representative*

Systematic sampling introduces a special possible type of problem in that there is the potential of automatically overlooking types of work and may miss certain times of particular activity.

e. *That frequent reporting is burdensome*

Dr. Mann has doubts that this assumption is correct.

f. *That monitoring can detect all sources of error*

Dr. Mann doubts the correctness of this assumption.

g. *That all cycles are captured*

Dr. Mann is not convinced that this assumption is correct.

h. *That CWA Districts are homogeneous with respect to variability*

Dr. Mann does not believe that this is correct. He pointed out that Table 4, on page 10 of the Westat Re-

port, in Column 4, entitled "Standard Deviation of Percent Retainable," that there are substantial differences in the percentages of deviation in the Districts. For example, Districts 1, 7, 8, 9 and 10 indicate a percentage of deviation from 4.2 percent to 7.8 percent, whereas Districts 2, 3, 4, 5, 11 and 12 indicate a percentage of deviation from 10.6 percent to 15.9 percent. These figures indicate that the Districts are *not* homogeneous with respect to variability.

i. *That the responses on the logs are accurate*

Dr. Mann believes that this is a "big assumption" inasmuch as accuracy can be influenced by the design and many other factors.

Dr. Mann is of the opinion that a census, rather than a sample as recommended in the Westat Report is much to be preferred. A census would be complete so that there is no loss of information. It lends itself to a review or examination of the items among the samples. The use of a census rather than a sample eliminates the necessity for the variable assumption and estimates and the danger of missing cycles. If a census were used, the assumption in regard to the homogeneity of the Districts is also eliminated.

The principal factor favoring the use of sampling instead of census is cost measured by money, or time or manpower. The form attached to the Westat Report with some modest modifications could be used in conducting a census. Dr. Mann does not believe that cost in this case is a pertinent factor in that he believes that the cost in doing a census would probably be about the same as the cost in doing a survey and possible cheaper since the census becomes routine and avoids much of the analytic and computer methodology. Taking all of the considerations into account, Dr. Mann is of the opinion that in this case a "census is preferable to sampling."

Portions of Deposition Of Irving B. Ross Taken June 1, 1981, Introduced by the Defendants

Irving B. Ross, a Certified Public Accountant, was one of the principal witnesses for the Plaintiffs in Phase I. His education, employment and special expertise in regard to the accounting methods and books of unions are set forth in the Original Report at page 15, and need not be repeated here.

The Defendants took Mr. Ross' deposition on June 1, 1981 excepting that Mr. Ross would testify for the Plaintiffs in Phase II. When the Plaintiffs' plans changed in this regard and Mr. Ross was not called as an expert witness by them, the Defendants, as provided in the Federal Rules, introduced portions of the Ross deposition as part of the Defendants' case.

Mr. Ross testified in his deposition that there are generally accepted accounting principles for allocating personnel costs. There are also generally accepted accounting standards or guidelines for documenting systems for allocating personnel costs. They are contained in Statement of Position 78-10 in the "June 15, 1980, Exposure Draft, A Proposed Guide for Auditors of Certain Nonprofit Organizations," Chapter 2. There are also generally accepted accounting principles for sampling techniques contained, *inter alia*, in "Statistical Sampling for Attributes, different publications of the American Institute of Certified Public Accountants. There are also generally accepted accounting principles for record-keeping generally in many documents and publications."

Mr. Ross has had occasion to use generally accepted accounting principles on cost allocation in his professional work in regard to nonprofit organizations allocating these costs on a program service basis. Unrelated to the present case, these organizations include: The America The Beautiful Fund, Incorporated, the American Association of Homes for the Aging, and National Lutheran Home

for the Aged. Mr. Ross also recalled that the Brotherhood of Railway and Airline Clerks and the International Association of Machinists and perhaps some other labor unions had cost allocation systems involving timekeeping.

In The America The Beautiful Fund, the President of the Fund as well as other employees kept time records. His firm had no trouble certifying the results of their study or their reports.

Someone in his firm, but not he, himself, might have assisted in designing that cost allocation system.

In regard to the National Lutheran Home for the Aged, his firm took part in the development of a cost funding system with respect to its Medicare and Medicaid cost reimbursements, the decisions in regard to the cost allocation system being made by Group Hospitalization, Inc. which was responsible for the implementation of regulations promulgated by the Social Security Administration, which called for a specific cost allocation system.

Mr. Ross found that the cost allocation system requiring the keeping of time records of the Brotherhood of Railway and Airline Clerks and the International Association of Machinists were deficient as being incomplete, the allocations being inaccurate inasmuch as the information was not representative of the time being spent. The insufficiency was disclosed by comparison of the time records with other documents, correspondence and the testimony of the machinists involved. The system used, however, by The America The Beautiful Fund, the National Lutheran Home for the Aged and the American Association of Homes for the Aging were—all involving cost allocations involving time records—were sufficient to meet Mr. Ross' standards.

The Plaintiffs put into evidence a part of his deposition (Plaintiffs' Exhibit No. 2010) in which Mr. Ross

testified: "I don't think there are any generally accepted accounting principles with respect to apportionments of retainable and non-retainable," to which counsel for the Defendants stated: "I agree."

Plaintiffs' Exhibits of Daily Activities Logs and Vouchers

The Plaintiffs have introduced into evidence some 2,197 Daily Activities Logs and Vouchers submitted and maintained by CWA Officers and Staff, for the four-month period involved in the study. In their Brief in Phase II, they classify a substantial number of those exhibits into groups indicating their alleged errors and lack of acceptability as a basis for any apportionment. These classifications include:

a. Logs which are blank as to activity or code citing, e.g., Plaintiffs' Exhibit Nos. 1462, 1463, 1472, 1474, 1475, 1476, 1477 and 1478.

b. Untimely logs citing, e.g., Plaintiffs' Exhibit Nos. 2012 (various pages), 754, 1457, 1458, 1459, 1460 and 1461.

c. Logs which show the inaccurate results of attempting to force activities into classifications citing, e.g., Plaintiffs' Exhibit Nos. 1502, 1504, 1505, 1506, 1507, 1508, 1511, 1512, 1513, 1514, 1515, 1516 and 1517.

d. Two logs for the same date, but with different information citing, e.g., Plaintiffs' Exhibit Nos. 1516, 1517, 1418, 1419, 1423, 1424, 1425, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 728, 1489, 1490, 1491, 1165, 1492, 503, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 33 and 1500.

e. Logs when taken together are contradictory as to activity citing, e.g., Plaintiffs' Exhibit Nos. 1356, 1357, 1371, 1372, 1418, 1420, 1421, 1422, 1426, 1427, 1428, 1429, 1439, 1440, 1443, 1444, 1358, 1359, 1361, 1362,

1360, 1363, 1364, 1365, 1366, 1367, 1368, 1375, 1376, 1437, 1438, 1445, 1446, 1451, 1452, 1441 and 1448.

f. Logs which contradict themselves citing e.g., Plaintiffs' Exhibit Nos. 1358, 1359, 1361, 1362, 1360, 1361, 1363, 1364, 1365, 1366, 1367, 1368, 1375, 1376, 1437, 1438, 1443, 1446, 1451, 1452, 1447 and 1448.

g. Logs which contradict each other as to code citing, e.g., Plaintiffs' Exhibit Nos. 1369, 1370, 1377, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1398, 1399, 1404, 1405, 1408, 1409, 1410, 1411, 1416, 1417, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1441 and 1442.

h. Expense vouchers reflecting activities not shown on the logs citing, e.g., Plaintiffs' Exhibit Nos. 2027, 2028, 2031, 2031A, 2032, 2033, 2036, 2037, 2038, 2039, 2040, 2129, 2130, 2131, 2041, 2042, 699, 2044, 2046, 475, 2045, 2047, 436, 2048, 2050, 2051, 2073, 2074, 2054, 2055, 2062, 2060, 2061, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114 2115, 2116, 2117, 2118, 2119, 2123, 2124, 2125, 2126, 2135, 2136, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 496, 2152, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2171, 2172, 2175, 2176, 2177, 2178, 2179, 2180, 2134, 2181, 1084, 2182, 2183-87, 2188, 2191, 801, 2193, 2196 and 2197.

Filed with their Brief in regard to Phase II, the Plaintiffs have filed Appendix I to Appendix XXV indicating the daily activities on the logs assigned to the 25 categories selected by CWA giving the activity description and the Plaintiffs' exhibit numbers. These Appendices consist of 60 pages, A-1 to A-60.

Counsel for CWA introduced into evidence as Defendants' Exhibit No. 16 an Affidavit dated June 26, 1981 of John Oki, employed by CWA to aid in the administration

of the discovery involved in Phase II. Pursuant to his employment he organized and reviewed the system under which documents were provided to counsel for the Plaintiffs for inspection and copying. During the period between April and June, 1981 all headquarters correspondence files for the period April 1, 1980 and March 31, 1981 were produced for inspection and copying by counsel for the Plaintiffs, these files containing some 85,000 documents. As part of the general process, 18,518 daily activity logs containing 150,155 entries as calculated by CWA data processing equipment were provided to counsel for the Plaintiffs. Also for the period between April, 1980 and March 31, 1981, a list of all CWA national vouchers (approximately 80,000) were provided for review and counsel for the Plaintiffs carefully reviewed approximately 26,000 vouchers for the period December 1, 1980 through March 31, 1981 and selected and listed specific vouchers from that list for direct inspection and copying. Approximately ten file boxes of individual vouchers were produced.

Counsel for the Plaintiffs were invited to challenge any of the statements in Defendants' Exhibit No. 16, but have not made any challenge. The Special Master accepts this statement to be correct and established in the case.

4.

Answers, with Reasons, of the Special Master to the Questions and Issues Presented to Him by the Memorandum and Order of January 19, 1981

The Memorandum and Order of January 19, 1981 resubmitting the case to the Special Master for further findings and report presented four questions and issues in regard to which the Special Master was to submit answers and additional findings. These questions and issues will now be presented in the order presented in the Memorandum and Order of January 19, 1981 as follows.

1. *Do the Unions' current record-keeping policies in any way alter the factual findings previously presented to the Court?*

a. The use of the word "current" indicates that the Court expected that the record-keeping position of the CWA Defendants at the time of the hearing before the Special Master would be in place and in actual operation so that they could be applied to the specific figures disclosed by the audited financial reports and records. This, however, has not been the case. The CWA Defendants produced evidence to set forth a system of record-keeping and allocation of costs which they hope and expect to apply *in the future.* This is clear from Nuland I and Nuland II, the Westat Report and the Saxe Format Report, as well as from the testimonies of Mr. Nuland, Dr. Bryant and Dr. Saxe, considered, *supra,* and particularly at pages 8 through 28 of this Supplemental Report.

b. There appears to be no dispute that the percentage of retainable (19 percent) and non-retainable expenditures (81 percent) held to be applicable in the Original Report continues in effect until modified upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of 19 percent of CWA expenditures were properly chargeable *in the future* to the Plaintiffs as Agency Fee Payors.

The answer to the first question or issue is therefore "No."

2. *If so, what method of computations would currently reflect the percentage of fee collected which are properly allocable to permissible activities?*

Even though as indicated in the answer to question or issue 1, *supra,* CWA has not yet put in place its proposed new system of record-keeping and allocation, the Special Master believes that the Court expects him to express his

opinion and to make findings in regard to the new proposed system. The Special Master now proceeds to do this.

a. Originally the question arises: Is it *possible* for CWA to devise and implement a system of record-keeping and allocation which will enable CWA to meet its burden of proving by clear and convincing evidence which expenses directly relate to and are reasonably necessary for the proper effectuation of collective bargaining, contract administration and grievance adjustment as required in the Original Report? See page 12 of the Original Report.

Although at least one of the Plaintiffs' expert witnesses expressed some doubt that this would be possible, the Special Master is of the opinion that it is possible for CWA to accomplish this, even though the proposed system set forth in its testimony, is not sufficient at the present time to accomplish this for the reasons later given.

Not only do the CWA exhibits indicate that it is possible to devise such a system, but the excerpts from the deposition of Mr. Ross, already referred to, give specific instances in which systems for nonprofit organizations possibly involving similar elements have been used and apparently audited.

Then, too, it should be remembered that in the Original Report it was determined that CWA was able to meet its burden of proof in regard to 19 percent of its expenditures being retainable. The newly proposed system is designed to enable CWA to increase this percentage.

b. The new system designed by CWA experts is generally sufficient subject to the correction of certain defects, supplying certain omissions and being properly monitored and administered.

The Special Master has concluded, and so finds, that the new system as set forth in Nuland I, Nuland II, the Westat Report, the Saxe Format Study and in the testi-

monies of Mr. Nuland, Dr. Bryant and Dr. Saxe is *generally* sufficient, prima facie, to enable CWA to meet its burden of proof as set forth in the Original Report, provided, however, that certain defects and omissions, later mentioned, are corrected or supplied and provided further that the system is properly monitored and administered as later considered.

The Special Master is not unmindful of the various objections forcefully made by counsel for the Plaintiffs. He is however of the opinion that these objections either do not substantially affect the *general* sufficiency of the proposed new system or will be met and overcome by the proper monitoring and administration of the proposed new system. These objections fall into several categories, as follows:

(1) *Errors in the Daily Activities Logs and Vouchers used during the December-March four-month period.*

The eight classifications of these errors appear on pages 39 and 40 of this Supplemental Report, and need not be repeated here.

It appears from the evidence that:

a) The logs referred to by the Plaintiffs were not collected in a format which was designed and pretested by professionals in timekeeping and survey design and was not subject to systematic monitoring—protections being required in the proposed new system.

b) During the four-month period 18,518 logs were filed containing 150,155 entries (see Defendants' Exhibit No. 16 considered on pages 40 and 41, *supra* of this Supplemental Report). The Plaintiffs have introduced 1,250 logs alleged to contain errors, or approximately two-thirds of one percent of the total entries. This indicates a remarkable degree of accuracy in view of the purpose for which

the logs were to be used (as a measure of variation from week to week) and without monitoring by professionals.

c) Many of the vouchers and logs, as properly understood, are not in error. Inasmuch as the logs in question are not an integral part of the proposed new system but for the more limited purpose mentioned in Nuland I and in the Westat Report, the Special Master accepts Dr. Bryant's opinion that the logs during the four-month period were sufficient for the limited purpose and, in any event, subsequent logs would be subject to monitoring by professionals and most of the possible errors eliminated.

(2) *The Application Assumptions presented in Dr. Mann's testimony have been explained and, where applicable, do not substantially impair the general effectiveness, prima facie, of the proposed new system.*

The Application Assumptions presented by Dr. Mann are set forth on pages 35 and 36 of this Supplemental Report and will not be repeated here. The Special Master is of the opinion that the testimony of Dr. Bryant and the Westat Report indicate that those Assumptions, where applicable, have been satisfactorily explained and do not substantially impair the general effectiveness, prima facie, of the proposed new system.

In the course of this application in the future of the proposed new system to the financial figures of CWA with the required monitoring, deficiencies may be discovered which can be then corrected. It should be remembered that the burden of proof in regard to specific items of expenditures being retainable remains upon the CWA Defendants throughout the operation of the new system and defects in the monitoring or operation of that system may, in a specific instance, prevent the CWA Defendants from meeting that burden of proof.

The substantial weight of the testimony indicates that the new proposed system is in accord with principles and

concepts currently used in accounting and in solving the difficult problems inherent in the allocation of joint costs. All of the experts agree that such allocation is difficult but, as indicated, the weight of the evidence indicates that it can and is being done by the use of the principles and factors involved in the proposed new system.

The burden of proof upon CWA outlined in the Original Report continues and to meet that burden the Special Master has concluded that there are deficiencies in the proposed system which might be corrected, certain omissions supplied, as well as proper monitoring instituted, and an effective administration carried out. When this is accomplished, the new system may well enable CWA to establish by clear and convincing evidence which of its expenses are retainable, i.e., those which are clearly embraced within collective bargaining, contract administration and grievance adjustment as defined in the Original Report, as directly relating thereto and reasonably necessary for the proper effectuation thereof. See page 12 of the Original Report. As noted in the Original Report (page 4) however, the Court's Order of March 16, 1979 (relying on *Allen*) indicates that the burden of proof upon the CWA Defendants did not require "absolute precision in the calculation" and the Court's Order of January 19, 1981, re-referring the case to the Special Master, indicates that the injunctive relief regarding the future collections of CWA should "be more flexible in order to accommodate possible changes in the unions' procedures." With the following recommended changes and additions, the Special Master is of the opinion that the revised new system will meet the criteria established by the Court in this case as well as in the Original Report. The recommended changes and additions will now be considered.

c. *Recommended changes in the proposed new system*

(1) The salaries of 17 elected officers treated as non-differential, inescapable costs in the new system and

treated as retainable expenses, should be abandoned, those officers required to submit daily activities logs and those salaries apportioned to retainable or non-retainable categories as are other salaries. The Special Master accepts in this regard the opinion of Dr. Hawkins, rather than the opinion of Dr. Saxe. It should be remembered also that the 17 elected officers completed time sheets in the CWA study involved in Phase I and their salaries were allocated on the same basis as other salaries. The same type of treatment should be applied in the new system also.

(2) The local subsidies by CWA to the local unions should be treated as an expense of administration rather than as 100 percent retainable. There appears to be a difference of opinion among accountants in this regard, but in the opinion of the Special Master the treatment of this item as "Administrative" appears to be the more reasonable and fair way to treat it.

(3) In the Original Report (pages 14-6), the Special Master held that the Organizing expenses were non-retainable in that CWA had not met the burden of proving that such expenses had any direct effect upon collective bargaining, contract administration and grievance adjustment and were reasonably necessary for their effectuation. He adheres to that position and holding. Organizing expenses are apparently treated in the proposed new system as retainable expenses, contrary to that holding. This issue will necessarily be decided ultimately by the Court. Pending such adjudication, those expenses should be placed in the non-retainable category and column.

(4) Proper monitoring in addition to monitoring by regular employees of the CWA Defendants is a vital and important part of the proposed new system. All of the expert witnesses indicated this, and this is recommended in the Westat Report, page 3. See page 16, *supra*, of this Supplemental Report.

Particularly in view of the involuntary nature of the payments to CWA by the Agency Fee Payors, the adversary nature of this compulsory relationship, and of the constitutional rights and issues involved, it is clear that there must be monitoring of the new system and its operations by a qualified organization, not part of the normal and usual operations of the CWA Defendants. Dr. Bryant so testified and this concept is included in the Westat Report, page 3. At noted earlier on page 16, Note 4, it is stated that Westat has been selected as the outside organization to do the monitoring. Although this statement is not part of the record in this case for the reasons stated in Note 4, it can be taken as an illustration of the type of monitoring which could be established on a continuing basis. Although Westat, and indeed any other duly qualified outside organization which might be employed to perform the monitoring will necessarily be paid by the CWA Defendants, this type of monitoring will be as free of bias in favor of the CWA Defendants as can reasonably be expected. In the opinion of the Special Master, Westat is fully qualified to do the monitoring and particularly in view of the qualifications and integrity of Dr. Bryant, the Special Master is of the opinion that such monitoring would be competently and objectively performed.

The monitoring and its results, supporting papers and data however should, before submission of the results obtained by the operation of the new system for the time period in question, be subject to consideration by counsel for the Plaintiffs and any experts selected by such counsel, who after such consideration, should have the right to object to any part of monitoring and its results, within a reasonable time present these objections to the Court for its decision in regard to those objections. The CWA Defendants in their Briefs state that such a provision should be included in any decree recommended by the Special Master.

In addition to the above provisions in regard to the review of the monitoring, its results and the results of the operation of the new system from time to time, a question arises in the mind of the Special Master in regard to who should pay for the reasonable value of the services of the inspecting counsel for the Plaintiffs and of any expert selected by such counsel. Dr. Mann adversely criticized the proposed new system on the ground that, in his opinion, it would cause additional litigation which the Plaintiffs might well not be able to afford. In any event, it seems to be reasonable, fair and just to the Special Master that, inasmuch as the review by the Plaintiffs is an integral part of the monitoring process required by the new system, the CWA Defendants should pay to the Plaintiffs the reasonable value of the services of their counsel and any expert selected by him, rendered in connection with their review of the above-mentioned monitoring process from time to time. The parties might well agree upon the value of such services, but, in the absence of such agreement, the Plaintiffs could submit the question of the amount of such reasonable compensation by an appropriate motion to the Court for determination, which after hearing the CWA Defendants, would award a monetary judgment for the amount determined by the Court. The injunction to be recommended to the Court by the Special Master will contain this additional provision for payment by the CWA Defendants of the reasonable value of the services rendered by counsel and any expert for the Plaintiffs, rendered in the monitoring process mentioned above.

d. *The basic form of Activity Report designed by Dr. Bryant as further refined in form but not in substance is, prima facie, proper for use in the new system.*

Dr. Bryannt testified in regard to how he personally prepared the format of an Activity Report for use in the

new system and then turned that form over to his staff and to counsel for the CWA Defendants for suggestions and comments. Various exhibits attached to the Westat Report indicate the tentative results of Dr. Bryant's work on the format of the Activity Report with certain modifications. The work on the format of the Activity Reports continued and counsel for the CWA Defendants indicated the completed draft with modifications on page 31 of their Supplemental Hearing Brief.

For the reasons stated in Note 2 on page 14 of this Supplemental Report, the draft presented in the Brief of the CWA Defendants is not part of the record; the Special Master however, has concluded that the modifications in that form of Activity Report are not substantially different in effect from the Activity Report forms which are on the record and, prima facie, may be used in the new system. Any difficulties which may arise from its use will most likely appear during the monitoring procedure and in the course of the operations of the new system.

3. *In what manner, if at all, may the computation procedure be made self-executing in order to compensate for future changes in Union policies?*

As the new proposed system of the CWA Defendants described above indicates, it cannot be self-executing but will require careful and frequent monitoring with the protections to the Plaintiffs above set forth. It is contemplated that the reports derived from the operation of the new system will be made within a reasonable time after the end of the CWA fiscal year, ending March 31 so that consideration by the Court of the proper determination of retainable and non-retainable expenses should hopefully be limited at the most to an annual consideration.

4. *How should the final injunction be framed in order to accomplish the object set forth in this Order and the prior Orders in this action.*

Counsel for the Plaintiffs and for the CWA Defendants have suggested the contents of a permanent injunction. These suggestions have been helpful to the Special Master, but he will set forth the provisions of his recommended permanent injunction when he modifies his Conclusion of Law No. 5 on page 41 of the Original Report. This modified Conclusion of law will supply the answer to question or issue No. 4.

5.

The Plaintiffs' Request for the Allowance of Attorneys' Fees not decided by the Special Master, Without Prejudice to Present their Request to the Court

The Plaintiffs, in their Brief, request the Special Master to award them reasonable attorneys' fees because of alleged bad faith and oppressive conduct by counsel for the CWA Defendants in the course of litigation. They rely upon *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) and *Rolax v. Atlantic Coast Line R.I. Co.*, 186 F.2d 473 (CA4, 1951).

Unlike the English Rule in regard to the allowance of attorneys' fees, the American Rule is that such fees will ordinarily not be allowed unless there has been "*bad faith*" or "*oppressive conduct*" on the part of the party against whom the award of attorneys' fees is made, and this may occur during the course of the action.

A substantial part of the alleged "bad faith" and "oppresive conduct" is stated to have occurred in a series of misrepresentations of counsel for the CWA Defendants before the Court in order to obtain the recommittal of

the case to the Special Master although some alleged misrepresentations are stated to have occurred at the hearings before the Special Master to prolong those hearings.

The Plaintiffs also state in their Brief in Note 512 on page 108 that "Plaintiffs will leave other possible bases for an award of attorneys' fees to presentation to the District Court post judgment."

Inasmuch as the principal grounds for the alleged "bad faith" and "oppressive conduct" occurred before the District Court prior to the Order of January 19, 1981, and with the indication that the Plaintiffs may present other possible bases for an award of attorneys' fees post judgment, the Special Master has concluded that he should not rule upon the request of the Plaintiffs of attorneys' fees, but leave this matter to the District Court without prejudice from the decision of the Special Master not to pass upon this issue.

Findings of Fact

1. The Special Master reaffirms Findings of Fact Nos. 1-7, inclusive, appearing on page 40 of the Original Report.

2. No facts have been presented in the hearings in Phase II which, at the time of the filing of this Supplemental Report, change the percentage of 19 percent of the total permissible or retainable expenditures or of 81 percent of impermissible or non-retainable expenditures of the CWA Defendants as calculated on Schedule E attached to the Original Report as found by the Special Master in Findings of Fact Nos. 6 and 7 in the Original Report.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law made by the Court, submits the following Conclusions of Law:

1. The Special Master reaffirms and incorporates here the Conclusions of Law Nos. 1, 2, 3 and 4 set forth on page 41 of the Original Report.

2. In *addition* to Conclusion of Law No. 4 appearing on page 41 of the Original Report, the Special Master presents the following Conclusion of Law:

4-A. CWA must refund to the Plaintiffs in Schedule F attached to the Original Report, in addition to the amount payable to them as provided in Conclusion of Law No. 4 on page 41 of the Original Report, 81 percent of the amounts paid by them to CWA as Agency Fee Payors from the time of filing of the Original Report on August 18, 1980 and the date of filing of this Supplemental Report to and including July 31, 1981 as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court in addition to the amounts mentioned in Conclusion of Law No. 4 on page 41 of the Original Report. The CWA Defendants shall pay such amount found to be due to the Plaintiffs into, and hold in, an interest-bearing escrow account, and in addition, shall pay at the end of each fiscal year of CWA subsequent to the filing of this Supplemental Report, the portion of the agency fees paid by each Plaintiff during each succeeding fiscal year, an amount equal to twice the amount determined in the previous fiscal year to be non-retainable, all pending the determination called for in Conclusion of Law No. 5, *infra*.

3. The Special Master adds, as a result of the testimony, exhibits, authorities cited and arguments made by counsel for the respective parties, the following additional Conclusion of Law:

4-B. The new system of CWA cost accounting, time-keeping and record-keeping, subject to the changes and additions recommended by the Special Master on page 45 of the Supplemental Report are, prima facie, a proper means for the CWA Defendants to seek to meet the

burden of proof to which they are now subject by virtue of the prior holdings of the Court and of the Special Master in the Original Report for determining the percentage of agency fees paid by the Plaintiffs as Agency Fee Payors that is retainable by CWA and the percentage which is not retainable.

4. The Special Master modifies Conclusion of Law No. 5 on page 41 of the Original Report to read as follows:

5. Plaintiffs listed in Schedule F attached to the Original Report are entitled to a permanent injunction restaining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs for the period of August 1, 1981 to March 31, 1982 and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA Defendants who has used the new system of record-keeping and allocations designed by the experts of CWA as set forth on page 43 of this Supplemental Report after supplying certain defects and omissions set forth on pages 45 and 46 of this Supplemental Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of this Supplemental Report. The Plaintiffs through their counsel and an expert or experts selected by him shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the Plaintiffs have been granted access to those papers as above provided, counsel and the experts of the Plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the Court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA Defendants on the 46th day after

the issuance of the report shall pay to the Plaintiffs the amount stated in the report. If such a statement is filed, the Court on the papers or after such hearing as the Court may deem proper shall determine the non-retainable amount. The CWA Defendants shall each fiscal year hold in an interest-bearing escrow account a portion of the agency fees paid by each Plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth. The CWA Defendants, as part of the monitoring expense for their new system, shall pay to the Plaintiffs an amount representing the reasonable value of the services of counsel and the experts of the Plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the Plaintiffs may submit by motion the question of the amount of such reasonable compensation to the Court for determination, which, after hearing the CWA Defendants, will award a monetary judgment to the Plaintiffs for the amount determined by the Court.

6. The Special Master reaffirms and incorporates here Conclusion of Law No. 6 as set forth on page 41 of the Original Report and in addition thereto adds the following:

All taxable costs which have occrued in the case since the filing of the Original Report on August 18, 1980 and the date of the filing of this Supplemental Report shall be paid 81 percent by the CWA Defendants and 19 percent by the Plaintiffs.

7. The Special Master reaffirms and incorporates here Conclusion of Law No. 7 as set forth on page 42 of the Original Report.

8. The Special Master does not decide the request of the Plaintiffs for the allowance of counsel fees for the reasons set forth on pages 49-50 of this Supplemental

Report and without prejudice to any proceeding in the Court upon this issue from the decision of the Special Master not to pass upon this issue.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. This Supplemental Report, as well as the Original Report, be adopted and the aforegoing Findings of Fact and Conclusions of Law, as well as the Findings of Fact and Conclusions of Law in the Original Report, except as such Conclusions of Law shall have been modified or amplified by the Conclusions of Law in this Supplemental Report, be adopted, applied and confirmed by the Court.

2. In view of the length of this Supplemental Report of the Special Master and the substantial number of issues, exhibits and pages of testimony involved, the time within which the parites may file exceptions, if any, to the Supplemental Report be enlarged from the ten-day period provided for in Federal Rule 53(e)(2) to thirty days from the date of filing the Supplemental Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully submitted,

/s/ Wilson K. Barnes
WILSON K. BARNES
Special Master

Dated: September 14, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

ORDER OF COURT EXTENDING TIME FOR FILING EXCEPTIONS TO REPORT OF SPECIAL MASTER

Upon the recommendation of the Special Master in his Supplemental Report filed in this Court on September 14, 1981, it is this — day of September, 1981, by the United States District Court for the District of Maryland, *Ordered*, that the ten-day period provided for in Federal Rule 53(e)(2) for the filing by the parties of exceptions, if any they may have, to the Supplemental Report of the Special Master be and the same is hereby enlarged to thirty days after the date of the filing of that Supplemental Report.

United States District Judge

SUPPLEMENTAL REPORT EXHIBIT NO. 1

LAW OFFICES

KANE, KOONS AND FITZGERALD
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
202-659-2044

June 6, 1980

Honorable Wilson K. Barnes
Hall, Steinmann and Fronk, P.A.
Ten East Baltimore Street, Suite 1212
Baltimore, Maryland 21202
Re: *Beck* v. *CWA*

Dear Judge Barnes:

Regarding the allowability of administrative expenses applicable to each category of expenditures, Mr. Beans' analysis and attachments 1 through 4 to the National's brief allocate the administrative or overhead costs from the right hand column among the activity categories in proportion to direct costs. Therefore to the extent that you might find any activity or class of activities not chargeable to plaintiffs, the same share of direct and indirect costs should be eliminated.

No overhead was allocated to the Defense Fund or to affiliation dues (AFL-CIO and PTTI) and local subsidies. If you should find the Defense Fund not chargeable to plaintiffs, their dues should be reduced by a flat 50 cents per month, the amount of the per capita monthly assessment from each dues payer to the Defense Fund. Should you find the affiliation dues and local subsidies not allocable, the plaintiffs' dues should be reduced by the appropriate percentages shown on attachment 1.

As for the local unions, I have reorganized the expenditure line items on Exhibit 5 into their respective classifications, e.g., class 1 includes all expenditures from each

local which CWA considers to fall clearly within the ambit of "collective bargaining, contract administration and grievance handling." The percentages shown are the percentages of that class of activity attributable to each line item. For example, in Local 2100, of the Local's total expenditures on class 1 activities during the sample periods, 52.2% was for grievances. According to attachment 4, page 3, 51% of that Local's total expenditures was for class 1 activities. To calculate the amount of total expenditures attributable to "grievances," multiply 51% x 52.2% = 26.62% of total local expenditures.

CWA has proposed that local administration costs be charged as ordinary and necessary business expenses and charged as direct costs to the plaintiffs. Should you conclude that any line item is not properly chargeable, that proportionate share of the administrative costs should be eliminated. Should you conclude that a proportion of the administrative costs attributable, e.g. to political activities should not be chargeable, then the same proportion of total class 5 costs should be eliminated as the political costs bear to total expenditures. For example, in Local 2108, if political costs were disallowed equal to 1.9% of total expenditures, administrative costs should also be reduced by 1.9%, resulting in an additional reduction in total cost of .97% (1.9 x 51.5) and a total reduction in total cost of 2.87% (1.0 + .97%).

I hope this has helped and not muddied the waters more. I will be in the office until mid-afternoon Monday, June 9, when I leave for the CWA Convention in Los Angeles. I will return on June 20. If anything additional is needed during this period, my office can contact me.

Very truly yours,
/s/ Matthew A. Kane
MATTHEW A. KANE

MAK:dg
Enclosure

Supplemental Report Exhibit No. 2

CLASSIFICATION OF LOCAL EXPENDITURES

EXPENDITURE	%	February, May August 1979 2100	%	FY 1978 2101	%	FY 1979 2108	%	FY 1979 2110
CLASS 1—Collective Bargaining, Contract Administration, Grievance Handling								
President			19.6	7,975.72	21.0	22,553.60	23.4	14,092.80
Convention			.8	319.02	.55	563.84		
District & State			.8	319.02	.55	563.84		
Pres. Conf.			1.6	638.04	1.1	1,127.63	1.5	880.80
Secretary Treasurer							4.6	2,761.20
Executive Vice President					17.4	18,685.84	4.3	2,594.80
Job Pressures Day							1.1	678.00
Telephone			7.4	3,002.08	5.4	5,776.97	2.9	1,723.00
Postage			7.3	2,994.50	3.7	3,973.95	4.3	2,597.36
Hall Rental	2.8	430.00	.6	225.00			1.6	960.00
Convention Expense			18.1	7,364.83	7.2	7,697.82	2.6	1,564.93
Grievances	52.2	7,966.43	8.5	3,448.93				
Education	25.6	3,907.41	9.6	3,934.60	6.5	6,955.26	7.5	4,553.59
President's Conf.	4.3	645.00	.6	232.53				
District Meetings	2.5	383.50	4.7	1,924.72			6.9	4,188.86
Safety Comm.			4.5	1,850.23	1.1	1,180.15		
Stewards Tr. (new)			.8	352.29	3.9	4,207.08	.8	474.15
Newsletter	10.8	1,641.30	2.3	932.98	(see publications)		14.5	8,742.15
Strike Comm.			.8	304.32				
Stewards Meeting Costs	1.8	280.00	.2	93.31			5.5	3,307.70
Steward Apprec.			5.2	2,138.00				
State Meetings			2.9	1,175.66				
Area Meetings			1.2	471.55				
Area Meeting Exp.			.3	123.35				
Miscellaneous			1.8	725.84	20.4	21,866.67	18.4	11,099.54
Legal fees			.4	154.88	3.7	4,000.00		
Printing and Publication					7.5	8,054.35	.1	79.11
TOTALS, Class 1		15,253.64		40,701.40		107,206.99		60,297.98
CLASS 2—Legislation								
Lobbying			5.3	391.02	10.7	563.84	5.3	146.80
Legislation	100.0	1,192.62	94.7	5,720.69	89.3	4,700.69	94.7	2,616.76
TOTALS, Class 2		1,192.62		6,039.71		5,264.53		2,763.56
CLASS 3—Community Service								
Community Service			7.5	797.55			15.7	176.16
Legal fees			11.7	1,250.00				
Gifts and contributions	100.0	727.50	5.6	602.48	58.4	3,654.15	56.2	629.00
Community Services			33.3	3,552.48			28.1	313.96
Wk. Comp. Comm.			1.4	143.84				
Union Label			38.1	4,069.04	41.6	2,604.23		
Art & Culture			2.4	257.62				
TOTALS, Class 3		727.50		10,673.01		6,258.38		1,119.12

CLASSIFICATION OF LOCAL EXPENDITURES

EXPENDITURE	%	February, May August 1979 2100	%	FY 1978 2101	%	FY 1979 2108	%	FY 1979 2110
CLASS 4—Political COPE			100.0	556.10	100.0	5,139.60	100.0	488.00
TOTALS, Class 4				556.10		5,139.60		488.00
Class 5—Local Administration								
Other salaries			5.1	5,582.85	2.0	2,819.22		
Secretary-Treasurer			3.2	3,516.37			11.6	2,245.50
Executive Vice President					5.7	8,008.22		
Officers' Expenses			2.84	3,094.71	11.5	15,377.89		
Taxes paid—Federal			24.22	26,406.27	28.8	40,163.18	20.8	4,027.00
Unemployment			1.45	1,579.39	2.3	3,207.90		
State taxes			4.99	5,435.70	6.2	8,690.77		
Janitor			.4	390.00				
Office Supplies	6.3	703.58	1.43	1,556.92	3.1	4,377.02	1.6	307.32
Equipment Lease							.3	66.02
Audit			1.9	2,050.00	2.7	3,757.50	4.0	775.00
Mortgage—Rent			8.8	9,631.80	9.4	13,181.06	19.1	2,691.00
Election Committee	2.0	224.00	.6	646.61				
Real estate taxes			3.74	4,082.02				
Office Equipment			3.4	3,743.17			4.3	836.00
Insurance			3.07	3,343.03	2.6	3,715.16		
General Admin.	86.7	9,680.93	7.65	8,338.12				
Office Equipment and Repair			.04	45.00	.9	1,228.94		
Building maintenance			2.6	2,814.54				
Clerical Sal. & Benefits			14.94	16,284.24	15.3	21,390.78	38.3	7,412.81
Audit Comm			.97	1,057.82				
Executive Board Meetings	5.0	561.20	2.54	2,763.73				
Purchases			3.12	3,396.09	7.8	10,898.64		
Utilities			3.0	3,274.06				
Building Fund					1.7	2,400.00		
TOTALS, Class 5		11,169.71		109,032.44		139,216.10		19,360.66
CLASS 6—Organizing								
Organizing			100.0	270.94	100.0	1,095.00		
TOTALS, Class 6				270.94		1,095.00		
CLASS 7—Social & Recreation								
Entertainment & Social			46.3	1,494.39	100.0	5,755.59	100.0	650.51
Retirees Club			40.8	1,315.42				
Meeting Refreshments	100.0	1,025.19	12.9	414.76				
TOTALS, Class 7		1,025.19		3,224.57		5,755.59		650.51

Deb 4 9.

Communications Workers of America, AFL-CIO

Expense Apportionment System

major accounts apportioned by time and activity codes study

METHODS 1, 2 & 5*

(ALL CAPS-non-differential costs)

PRESIDENT
GLENN E. WATTS

Exec. Asst. to Pres.
Beaumont

Asst. to Pres.
Fryman
Easterling

Public Employees
Schultz

Adm. Asst. to Pres.
Mendoza

Communications System
Confer
Scally

Ethnic Affairs
Clark

Womens Activities
Foreman

International Affairs
Moore
024

SECRETARY-TREASURER
LOUIS B. KNECHT
Webb
Gee
Shepperson
Hassen
025*

*see chart 2

Development & Research
Straw
Bliss
Foged
Goff
Heckscher
Hunt
Kohl
Novotny
Williamson
027

Organizing
Muscat
Cervantes-Gautschi
Margolies
Tanner
028

Independent Telephone
Browning
Howard
020

Public Affairs
Weisman
Kent 045*

CWA NEWS (ED)
Miller 035*

*see chart 2

EXECUTIVE VICE PRESIDENTS

JOHN C. CARROLL
Kocis
Contract Section
Atkins
Murrill
Wolf
085

JAMES B. BOOE
Hippie 086
Legislation
Bowen
Gerber
J. Morgan
Lobie 023

M.E. NICHOLS
Ferguson 087
Education
Kutstad 022
Community Services
Mays 028

NATIONAL BARGAINING UNITS

WE Installation	WE Sales	AT&T Long Lines	WE Mfg.-Bell Labs
Padgett Murray 016	Bergstrom Kennedy 017	Pierson Irvine 018	Price Talarico 021

District 4	District 5	District 6	District 12
HUGHES Staff 04	BUTTON Staff 05	LOVETT Staff 06	GRAY Staff 012

District 7	District 8	District 9	District 11
HAYWOOD Staff 07	MAULS Staff 08	MOTTS Staff 09	DEMENS Staff 011

District 1	District 2	District 3	District 10
DAHR Staff 01	STACK Staff 02	PORCH Staff 03	BOSHTO Staff 010

APRIL 1981

Supplemental Report Exh. A.T. No 2

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24 4 10

Communications Workers of America, AFL-CIO

Expense Apportionment System

other major accounts

METHOD 3
DIRECT IDENTIFICATION

100% Retainable

- Bargaining Councils — 043
- Contract Reports & Ratifications — 058 & 078
- Local Subsidies — 074
- Contract Agreement Printing — Expense Code 1301

100% Non-Retainable

- Citizenship Fund — 028 & 082
- Contributions — 030
- Affiliation Dues — 039
- Foreign Affairs — 047
- Bakna Fund — 081

METHOD 4

Direct Apportionment (Specific Analysis)

- Committees & Conferences (Topic&Activity) — 034
- * CWA News (Exc. Editor) (Content) Expense Code 1401, 1402 & 036
- *Public Affairs (Contract Services) — 045
- Education Programs (Content) — 048
- Strike & Defense Funds (Activity) — 050 & 053

METHOD 6

Administrative

- *Secretary-Treasurer (Admin.) — 026
- Conventions (Inc. Committees) — 032
- Executive Board — 033
- Insurance (Exc. Employee Benefits) — 037
- Taxes (Exc. Payroll & Real Estate) — 038

DIRECT IDENTIFICATION AS ORGANIZING

Organizing

- Organizing Fund — 075
- District Organizing — 099

- Professional Fees (Services) — 056
- Legal (Billings) — 031

APRIL 1981

ADMINISTRATIVE

1120-1129 PART TIME SALARY
1210-1219 PART TIME TRAVEL
1510-1511 RENT MEETING ROOMS
1300-1304 SUPPLIES & PRINTING (EXCL. 1301)
1400 POSTAGE, EXPRESS & FREIGHT
1430 CONTRACT SERVICES (EXCL. PUBLIC AFFAIR
1602-1609 OTHER EXPENSES

BEST AVAILABLE COPY

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
Defendants

REPORT OF WILSON K. BARNES, SPECIAL MASTER

Order of Reference to Special Master
Dated May 3, 1979

Report filed August 18, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
Defendants

REPORT OF SPECIAL MASTER

On May 3, 1979, the Honorable C. Stanley Blair, United States District Judge (now deceased)[1] passed an Order appointing Wilson K. Barnes as Special Master in this case pursuant to Rule 53 of the Federal Rules of Civil Procedure. In the Order of Appointment of May 3, 1979, the District Court granted the Special Master the following powers:

> ". . . The special master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusions of law heretofore reached by the undersigned judge in this proceeding. The parties shall bear the expenses of this reference including the fee of the special master in such amounts and in such proportions as

---

[1] This case has been assigned since Judge Blair's death to the Honorable James R. Miller, Jr., United States District Judge.

may be assessed by the court after recommendation by the master."

The Court, subsequent to the Order of May 3, 1979, has not restricted the powers of the Special Master covered by Rule 53 in regard to rulings on the admissibility of evidence or otherwise.

The Court in its Memorandum and Order of January 13, 1979 summarized the prior proceedings in the case, indicating that the plaintiffs were twenty individuals engaged by various Maryland subsidiaries of American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P) and were subject to collective bargaining agreements between the employers and the defendant union, Communication Workers of America (CWA).

The plaintiffs are not members of CWA or of any labor organization, but are "agency fee payors" required to pay to CWA as a condition of employment, an amount equal to periodic union dues and assessments, so that they would not share in benefits obtained by collective bargaining without sharing the cost.

The Court noted that this "agency shop" arrangement is not prohibited by Section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. Sec. 158(a)(3) and has consistently been upheld by the Supreme Court of the United States, citing *NLRB v. General Motors Corp.*, 373 U.S. 734, 735 (1953); *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409, 96 S.Ct. 2140, 48 L.Ed. 2d 736, (1976).[2]

In the present action, the plaintiffs do not challenge the validity of the agency shop but seek, *inter alia*, to

---

[2] Section 14(b) of the National Labor Relations Act permits individual States to prohibit such union-security agreements, 29 U.S.C. Sec. 164(b) and this section has been sustained by the Supreme Court, but Maryland has not done this.

enjoin the enforcement of the agency shop provision in the Contract insofar as the fees collected from the plaintiffs are allegedly used for non-collective bargaining purposes. They allege in substance that their coerced payments are used to support lobbying efforts and political campaigns which the plaintiffs oppose in violation of the right of the plaintiffs under the First Amendment to the Constitution of the United States to express themselves freely and without prior restraint. Indeed, the plaintiffs oppose the expenditure of agency funds for *any* purpose not directly related to collective bargaining, contract administration and grievance adjustment, not only those expenditures primarily political in nature. They oppose, for example, expenditures for union social functions, maintenance of strike benefit funds and scholarship funds among other expenditures. In Note 3 of the Memorandum of January 12, 1979, the Court stated:

> "This court reserves for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the non-collective bargaining purposes complained of, noting that there does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for 'political purposes' which are clearly impermissible and expenditures for 'collective bargaining, contract administration, and grievance adjustment,' which are, of course, permissible. *Compare* Internat'l Assn. of Machinists v. Street, 367 U.S. 740, 774-75 (1961) and Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employees v. Allen, 373 U.S. 113, 121 (1963) *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26 and 236 and n. 33 (1977)."

The Court observed that the Supreme Court has suggested that labor unions might avoid infringing on the First Amendment rights of the agency fee payors by establishing internal procedures for determining what

proportion of the union budget was allocated to political purposes and refunding the proportionate amount to them and excusing them from "contributing" that amount in the future, citing *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 122-23, 83 S. Ct. 1158, 10 Ed. 236 (1963); *International Association of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S. Ct. 1784, 6 Ed. 2d 1141 (1963); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

CWA has established an internal procedure, but the Court held that the plaintiffs were not required, in this case, to exhaust the possible rebate procedure for the reasons set forth in the Court's Memorandum of January 12, 1979, and denied CWA's motion for a stay pending exhaustion of such internal union procedure in that such exhaustion of a possible remedy would not promote settlement and would cause unnecessary delay.

The Court also observed that in *Allen*, the Supreme Court indicated that the union which collects and disburses the agency fees bears the burden of determining the correct proportion of political expenditures which the agency fee payor may recover, stating:

> "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."
>
> 373 U.S. 112, 83 S. Ct. 1163.

In the Court's Memorandum and Order of March 16, 1979, it was provided:

> "In this case it is undisputed that the defendant union, CWA, has negotiated an 'agency shop' clause

with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. *See* Exhibits A-1 and A-2 to the Complaint. It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than 'collective bargaining, contract administration and grievance adjustment.' Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three enumerated ones.

"Thus it appears that the plaintiff agency-fee payors are entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes. *Allen, supra*, 373 U.S. at 122; *Street, supra* at 774. This relief necessarily requires a determination of what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment. *Street, supra*, 367 U.S. at 775; *Allen, supra* at 121. The burden of proving such proportion rests upon the union, but 'absolute precision in the calculation of such proportion is not, of course, to be expected or required,' *Allen, supra* at 122.

"Accordingly, it is the judgment of this court, to be set forth separately by the Clerk as required by Fed.R.Civ.P. 58, that:

"(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiffs' employers, the defendant, CWA, has collected and con-

tinues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

"(2) That such collection by the defendant violates the first amendment rights of the plaintiffs;

"(3) That the parties may agree upon the percentage of the defendant's budget disbursed for purposes other than the three permissible ones;

"(4) That if, at the expiration of thirty (30) days from the date of this Order, the parties remain unable so to agree, then, pursuant to Fed.R. Civ.P. 53, the matter will be referred to a master of the parties' own choosing;

"(5) That if, at the expiration of ten (10) days from that date, the parties are unable to agree upon a master, then this court will appoint a master;

"(6) That in the event of reference to a master, of either the parties' or the court's choosing, if the parties are unable to agree upon an equitable allocation of the costs of the reference, then this court will direct the master to make findings of fact and recommendations with respect to the apportionment of costs as between the parties which the court may adopt;

"(7) That when it has been determined what portion of the agency fees the defendant has collected improperly, the defendant is to refund to each plaintiff for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration and grievance adjustment; . . ."

The parties not having agreed upon a Special Master to be appointed, the Court, on May 3, 1979, pursuant to Rule 53, Fed. R. Civ. P., passed the following Order:

". . . the court, acting pursuant to Rule 53, Fed.R. Civ.P., hereby appoints as a special master the Honorable Wilson K. Barnes, retired Associate Judge of the Maryland Court of Appeals. The special master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusions of law heretofore reached by the undersigned judge in this proceeding. The parties shall bear the expenses of this reference including the fee of the special master in such amounts and in such proportions as may be assessed by the court after recommendation by the master."

The Special Master began the proceedings before him in this case by a Conference with counsel on May 15, 1979.

The case has proved to be a rather formidable one. There have been 27 actual hearing days for the taking of testimony, and one full day for argument of counsel. The number of pages of testimony has amounted to 3,844. There have been in excess of 2,100 documentary exhibits, some containing subdivisions a, b, c, etc.

Counsel for the parties and the Special Master were able to agree at the beginning of his service upon the basis of the Special Master's compensation, to be paid monthly in equal shares by the respective parties and the total compensation as thus agreed upon to be apportioned by the Court, after considering a recommendation by the Special Master.

During the course of hearing testimony, there were a number of objections to the admissibility of testimony.

The Special Master sustained the objection of the Plaintiffs in regard to the admissibility of one document; all of the other documents, papers and testimony to which objections were made, were taken subject to exception with leave to the objecting party to move to strike out such testimony or documents at the end of the case. Neither party exercised that right. But, there was, however, a Motion to Strike certain testimony of a witness before the end of the case, the Special Master reserving his ruling on that Motion until the end of the case. The Motion is now overruled, so that all the testimony and documents admitted into evidence subject to exception are now evidence in the case.

On September 26, 1979, upon a Motion by the Plaintiffs, pursuant to F.R. Exid. 106, the Special Master passed an Order in Limine, as follows:

> "(1) Plaintiffs cannot introduce testimony or evidence that CWA's activities do not benefit them; CWA cannot introduce testimony or evidence that its activities do benefit Plaintiffs;
>
> "(2) Plaintiffs cannot introduce testimony or evidence that CWA's costs of collective bargaining, contract administration and grievance adjustment are unreasonable; CWA cannot introduce testimony or evidence that those costs are reasonable;
>
> "(3) Plaintiffs cannot introduce testimony or evidence that collective bargaining, contract administration, and grievance adjustment can be secured at less cost than CWA provides them; CWA cannot introduce testimony or evidence that those activities cannot be secured for less cost than the agency fee."

The Plaintiffs and CWA complied with this Order in Limine, and there are no issues in the case in regard to the "benefit", vel non, of CWA activities, and the "reasonableness of costs" of collective bargaining, contract administration and grievance adjustment.

Counsel for the respective parties have demonstrated to the Special Master their competence and zeal in representing their respective clients and have cooperated with the Special Master and with each other in the presentation of the case and expedition of the hearings and argument in the case.

Elaborate and helpful briefs were filed on behalf of each party and the arguments in the case were enlightening and of substantial help to the Special Master.

Turning to the role of the Special Master, it is apparent that the Court has already decided and articulated the law applicable to the case. The Special Master is, of course, bound by and must follow the Court's rulings as the law of this case.

The principal ruling by the Court as applicable to the Special Master in the formulation of his Report setting forth his conclusions on the evidence and recommendations to the Court is that CWA and the other Defendants have the burden of proving the amounts spent by them for the period January 1, 1976 to date for "collective bargaining, contract administration and grievance adjustment."

Inasmuch as the Defendants did not keep their books of account upon any theory of separation of items or amounts upon this basis, the Defendants have been presented with a most difficult task in meeting this burden of proof.

In view of the Constitutional issues involved, the burden of proof requires that the Defendants prevail, if at all, upon "clear and convincing evidence". *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 91 S.Ct. 1811, 1828, 29 L. Ed. 2d 296 (1971), but as the Court's Order of March 16, 1979 (relying on *Allen*) provides, the burden of proof upon the Defendants does not require "absolute precision in the calculation". The Special Master must seek to stear his course between these two concepts

in regard to the testimony and to seek to clarify the "gray area" left open by the Supreme Court in *Abood.*

CWA maintains an elaborate system of books of account with some 63 different account numbers. Although all of the separate accounts and their account numbers are important in this case, the most important ones are:

Account	Number
District 2	002
Negotiations Dept.	021
Education Dept.	022
Legislation Dept.	023
Administration	024
Development and Research	027
Legal	031

The four local unions involved in the case are all in District 2.

The Plaintiffs do not challenge the accuracy of the various figures, as such. They vigorously challenge whether various items were properly established as proper charges to CWA and the four Local Unions and whether CWA has met its burden of proof in allocating various expenditures to collective bargaining, contract administration and grievance adjustment.

As already indicated, CWA and the Local Unions did not maintain its books and records on the basis of allocating all of its expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand, and all other expenditures on the other. In an effort to make such an allocation from the existing CWA books and records, the Defendants offered the testimony of Charles Robert Beans, with supporting exhibits. Mr. Beans is a Certified Public Accountant. He has been in public accounting since 1954 and became certified in 1961. He has been involved in the accounts of CWA since 1968. He and his firm audit the CWA books and prepare the

annual CPA Report on the financial operations of CWA. They also assist in the preparation of the CWA annual budget, as well as the financial reports filed with the Federal Government under the Landrum-Griffin Act. He is familiar with CWA's accounting structure and the classification of accounts.

For the purposes of this case, Mr. Beans made a study of the accounts of CWA for its fiscal year beginning April 1, 1977 and ending March 31, 1978, taking the position that this study can be used as analogous to the other periods of time involved in this case. Mr. Beans wrote a letter dated January 31, 1980, to Louis B. Knecht, Secretary-Treasurer of CWA, to which was attached a study of the accounts of CWA for the year in question. The letter of January 31, 1980, will be filed with this Report as Appendix A-1 and the attached Beans' Study as Appendix A-2. Mr. Beans testified that in his consideration of CWA activities he was guided in part by part of the answers of CWA to the Plaintiff's First Amended Interrogatories. The relevant part of those answers, consisting of 21 various categories of activities, is attached to this Report as Apendix B.

Mr. Beans was quite aware of the difficulties in the task presented to him. In regard to the 1977 and 1978 studies, he stated that he would not attach an unequivocal opinion letter to either of them, because of the lack, in part, of an adequate data base. In regard to the 1977 study, Mr. Beans stated that the study was like trying to make a "frog fly". In the opinion of the Special Master, however, parts of Mr. Beans' studies were helpful and based on data and reasonable inferences in regard to whether CWA has met its burden of proof, but others were not sufficiently established.

In considering the various items of expenditures, the Special Master has arranged them—like all Gaul—into three parts, i.e., (1) *permissible*, that is properly charged

to the Agency Fee Payors for payment; (2) *impermissible*, that is completely disallowed as chargeable to the Agency Fee Payors; and (3) *partly permissible*, that is, some proportion of the expenditures are permissible and part are impermissible, giving the percentage of the portion which is permissible.

It is interesting to note that the Reports of Main, Lafrantz & Co., Certified Public Accountants, for CWA for the years ending March 31, 1976, 1977, 1978 and 1979 (Defendants' Exhibits W1-W4), indicate on Statement 2 the amount and source of CWA Revenues, as follows:

Total Revenue from Dues		Non-Member Dues (dues equivalent)
	1976	
$20,007,064.02		$ 584,789.39
	1977	
23,167,145.84		1,332,359.38
	1978	
24,624,685.71		1,282,971.80
	1979	
26,458,984.37		1,578,610.21

For the years 1977, 1978 and 1979, the amount of Non-Member Dues was approximately 5% to 6% of the total revenue from dues, that proportion varying very little during the three years mentioned.

The Special Master does not accept the argument of CWA that substantially all of its expenditures (except the political portions from the general fund, i.e., 1.89% in 1978, 1.90% in 1979 and 1.94% in 1980) are permissible charges. This is based on the theory that the CWA expenditures for legislative purposes, for contributions and the like are "germane" to collective bargaining in that they "strengthen the hand", as it were, of the Union when actual collective bargaining procedures begin

by having a good rapport and sympathetic understanding with the public officials and the public generally. This position (with certain exceptions) was articulated by Dr. Walter Galenson, Jacob Gould Professor of Economics and Industrial Relations at Cornell University and also by Dr. Willard Wirtz, former Secretary of Labor and a member of the Bar, the two expert witnesses produced by CWA and by Glen E. Watts, the president of CWA, but the Courts have not embraced this position. On the contrary, Judge Blair in Note 3 of his Memorandum of January 12, 1979, *supra* at page 3, observes that there is a *gray area* (citing *Abood*) which indicates that not substantially all of the Union's expenditures, other than those for "political purposes", are permissible. And, see *Ellis-Falls Railway Clerks*, Civil Nos. 73-113-N and 73-118-N, Par. 11.290, Labor Relations Cases, S. Dist. of California, 1-20-76, Nielson, D.J.

One of the conceptual difficulties of CWA and many of its witnesses lies in the absence of a clear definition of "collective bargaining" within the context of this case. Indeed, as indicated, Dr. Wirtz is of the opinion that the phrase was incapable of definition. The Special Master is of the opinion, however, that "collective bargaining", as applicable in the present case, not only *can* be defined, but *has been* defined for the purposes of this case.

The National Labor Relations Act (NLRA), 29 U.S. # 158(d) states a definition of collective bargaining which is appropriate for this case. Subsection (d) provides in relevant part:

> ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written

> contract incorporating any agreement reached if requested by either party. . . ." [3]

This definition of "collective bargaining" is in accordance with the common understanding of those words and is in accordance with the definition of "collective bargaining" in Webster's Seventh New Collegiate Dictionary (i.e., "Negotiations between an employer and a union representative usu. on wages, hours, and working conditions").

Chief Judge Parker for the United States Court of Appeals for the Fourth Circuit in *United Construction Workers and United Mine Workers of America v. Haislip Baking Co.*, 223 F.2d 872, 877 (1955)—a case arising under Section 301 of the Labor Management Relations Act, 29 USC # 185(a)—stated:

> "Collective bargaining, however, has the well understood meaning in the law of settling disputes between employer and the representative of the employees."

See *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 547-549, 57 S. Ct. 592, 599-600, 81 L.Ed. 789 (1937, unanimous opinion for the Supreme Court by Stone, J.) involving the Railway Labor Act, as amended, 45 U.S.C. ## 151-163.

In the opinion of the Special Master, the Defendants in order to charge the Agency Fee Payors for an expenditure for collective bargaining are obliged to establish that the claimed expenditure is reasonably within the parameters of the definition above set forth.

"Contract administration" is reasonably well defined and "grievance procedure" is likewise reasonably well established not only by the meaning of the words them-

---

[3] This statutory statement in regard to collective bargaining was not changed or modified by the amendment of Subsection (d) by the Act of July 26, 1974, Public L. 93-360, #1(C)-c).

selves, but also by the established and well-understood procedures under these hearings. Here too, the Defendants are obliged to establish that claimed expenditures under these two headings are within the scope of "contract administration" and "grievance adjustment" as understood and established.

No case has been called to the attention of the Special Master and his own research has not disclosed any case which establishes a rule or guide by which an expenditure in the "gray area" can be determined to be permissible, impermissible or partly permissible. Dr. Wirtz indicated that in his opinion, such a determination must be made *ad hoc* on a case-by-case basis and that it is impracticable, if not impossible, to fashion an applicable rule or guide. In short, the trier of fact cannot apply a rule or guide in regard to permissibility but, like obsenity, he "knows it when he sees it."

The Special Master, however, will seek to formulate a rule or guide which he will attempt to apply in the present case, i.e., that expenditures not clearly embraced within collective bargaining, contract administration and grievance adjustment, as defined, will only be permissible if such an expenditure *directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment. This rule must be strictly applied in view of the First Amendment rights of the Plaintiffs inasmuch as otherwise those vital and important rights will be impaired by too broad an application of the rule. For example, the Defendants earnestly contend that their charitable contributions not only, in themselves, advance the public interest, but create a favorable climate of public sympathy and support when collective bargaining time arrives and particularly when there is a strike.

This result, while superficially plausible, has not been established by clear and convincing evidence and charita-

able contributions do not directly relate to, and are not reasonably necessary, in the opinion of the Special Master, for the proper effectuation of collective bargaining, contract administration and grievance adjustment. Again, in the context of the First Amendment rights involved, the Plaintiffs may not approve of the particular charities receiving the largess of the Union, and have by this action and otherwise, protested against this type of expenditure. Then too, the Plaintiffs may well have their own favorite charities other than the Union-favored ones, to which they may wish to contribute the portion of their agency fee payments allocated by the Union to charitable contributions. .

Turning now to the expenditures involved, it will be helpful to use the aforementioned Beans' study for the fiscal year beginning April 1, 1977 and ending March 31, 1978 (Beans Study) as a focal point for determining which expenditures are permissible those which are impermissible and partly impermissible. The figures used will generally be rounded off to the nearest $1,000.00 inasmuch as the hundreds of dollars and the cents involved will have little or no effect on the ultimate result and their elimination in the calculations will make the calculations much easier to follow.

The Beans' Study is for the fiscal year ending March 31, 1978 as already noted and was selected for the reasons already set forth. It has eight separate headings for eight separate columns of figures, i.e.: (1) Collective Bargaining, (2) Grievance, (3) Contract Administration, (4) Organizing, (5) Labor Legislation, (6) Community Services, (7) Political and (8) Administration. There are 40 separate classifications of items of expenditures. Thirty-five are listed under the heading "General Fund", to which five "Fund" classifications are added, namely, the Defense Fund, the Organizing Fund, the Citizenship Fund, the District Organizing Allocation Fund and the Contract Report and Ratification Fund. After sub-totals

are obtained for the eight separate columns, there is an apportionment of the Administrative Column total among the other seven columns.

The total expenditures for the year 1977-78 is $29,240,000. It is apparent that the first three columns—Collective Bargaining, Grievance and Contract Administration—are the classifications primarily involved in this case. The importance of the eighth column—Administration—lies in its allocation to the remaining seven columns after the subtotals are taken and especially its allocation to the first three columns.

Mr. Beans, in his work sheets, introduced into evidence, and in his oral testimony, has given his reasons for his allocations. The figures for the most part are taken from the books and records of CWA.

By the Beans Study, the first three columns amount to 86.38% of the $29,240,000 total expenditures, whereas the remaining four columns—Organizing, Labor Legislation, Community Services and Political—amount to only 13.62%, namely 6.20%, 2.27%, 3.35% and 1.77%, respectively.

The Special Master, however, has concluded, from his examination of the exhibits, his consideration and evaluation of the testimony and the inferences arising from the exhibits and testimony, that many of the expenditures allocated to the first three columns—Collective Bargaining, Grievance and Contract Administration—are either impermissible in whole or impermissible in part and, further, that a number of the expenditures allocated to the eighth, or Administrative column, are also either impermissible in whole or impermissible in part.

CWA concedes that the $376,902 of Political expenditures (Column 7, 1.77%) is "refundable to the Plaintiffs". The Special Master finds that this is an impermissible expenditure.

The Special Master also finds that the $709,574 total for Column 6, Community Services, is also impermissible. The reasons for this finding have already been stated above and need not be repeated here.

In regard to Column 5, Labor Legislation, the Special Master finds that this total of $481,000 is impermissible. Many of the items of expense listed under this classification involve lobbying efforts by the CWA lobbyists to promote legislation far remote, in the opinion of the Special Master, from collective bargaining, contract administration and grievance adjustment. For example, the CWA lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment, not only are not directly related, but were and are quite controversial as matters of national policy in regard to which the Agency Fees Payors might well object and for which the expenditures of any part of their Agency Fee Payments deny them their First Amendment rights. Nor are these lobbying efforts reasonably necessary for the effectuation of collective bargaining, contract administration and grievance adjustment. There may be certain legislative or administrative proposals which have some possible direct bearing on collective bargaining such as the Telecommunications Act or Occupational Health and Safety Regulations, but CWA has not met its burden of proof in demonstrating what expenditures, if any, were made in regard to that Act or those regulations. The whole classification must be held by the Special Master to be impermisssible, and he so holds.

Considering the fourth Column—Organizing—with a total of $1,313,000, here again, the Defendants do not, in the opinion of the Special Master, meet the burden of proving that the expenditures for organizing have any direct effect upon collective bargaining, contract administration and grievance adjustment, and are reasonably necessary for their effectuation. The evidence rather indicates that the organizing activities of the Defendants are

designed to increase the Union membership, but there is no evidence that such an increase would have any direct effect upon collective bargaining, contract administration or grievance adjustment, and are reasonably necessary for their effectuation. The organizing expenditures are impermissible and the Special Master so finds.

It will be noted that no part of the expenditures allocated in the Beans' Study to Columns 4, 5, 6 and 7—Organizing, Labor Legislation, Community Services and Political—were allocated later to Columns 1, 2 or 3—Collective Bargaining, Grievance and Contract Administration—and, in the opinion of the Special Master, this was proper for the reasons already stated.

Considering now, Columns 1, 2 and 3—Collective Bargaining, Grievance and Contract Administration—the Beans' Study with the supporting work sheets give the various items which make up the totals allocated to those columns. A Certified Public Accountant, Irving B. Ross, was produced by the Plaintiffs as an expert witness to analyze the Beans' Study and supporting work sheets and give his professional opinion in regard to the various items involved.

Mr. Ross is a well qualified expert. He received his Bachelor of Science Degree from the University of Connecticut in 1965 and later took courses towards a Masters Degree at American University in Washington, D.C. He became a Certified Public Accountant in 1967. He is the Senior Partner in the accounting firm of Ross, Langan and McKendrix, having some 22 persons, mostly accountants and secretaries, employed by it. He is quite familiar with the accounting methods and books of unions having been employed in connection with the litigation in *Seay, supra* (spending personally in excess of 750 man hours), in *Ellis-Falls, supra* (in which he testified as an expert witness and spent personally an estimated 1,500 man hours), and in *Ball, supra*; in which, thus far, he has

personally spent an estimated 100 man hours. In these cases, as in the present case, one of the most important issues was in regard to what expenditures by the Unions involved, were properly chargeable to agency fee payors.

In his testimony, Mr. Ross impressed the Special Master most favorably in regard to his competence, his integrity and his truhtfulness. He is found to be not only unusually well qualified as a Certified Public Accountant in the particular area of accounting involved in the present case, but also to be objective, truthful and accurate.

Mr. Ross was given for his professional consideration Mr. Beans' letter of January 31, 1980 to Louis B. Knecht, Secretary-Treasurer of CWA (Defendants Beans Exhibit # 1), together with the Beans' Study attached and Mr. Beans' work sheets supporting the letter and the Beans' Study. Attached to this Report as "Appendix A-1" is a copy of the Beans' letter of January 31, 1980, and as "Appendix A-2" the attached Beans' Study. Mr. Ross not only considered this material but also considered the Statement of Position entitled Accounting Principles and Reporting Practices for Certain Non-Profit Organizations published in December, 1978 by the American Institute of Certified Public Accountants, Accounting Division (AICPA), giving guidelines for the steps a non-profit organization should take in determining the cost or expenses by function.

Mr. Ross testified that the purpose of his review was to give his "professional opinion as to whether the classifications in the schedule can be relied upon in terms of yielding accurate results of the activities listed: namely, collective bargaining and non-collective bargaining." He used the term "collective bargaining" as also including "grievance" and "contract administration". He concluded that "there are certain deficiencies evident, based on my review and based on the procedures that were followed by the Certified Public Accountants in the course of the

engagement; and, consequently, I do not believe that generally accepted cost accounting principles were applied in coming up with these results; and, therefore, the numbers should not be relied upon as giving what I call reasonably accurate determinations of collective bargaining costs."

The first item under the hearing "General Fund" in the Beans' Study is "Districts". It represents the largest single item in the first three Columns amounting to $8,804,000, made up of $1,724,000 under Column 1, "Collective Bargaining", $3,651,000 under Column 2, "Grievances" and $3,429,000 under Column 3, "Contract Administration".

In the Beans' letter of January 31, 1980 to Secretary-Treasurer Knecht (Appendix A-1, page 2), Mr. Beans states the general basis upon which he made the District calculations and allocations. He stated:

> "Districts—The staff of *District 2* was asked to indicate which of the activities listed as activities of the Union in the 'Answer of CWA Defendants to Plaintiffs First Amended Interrogatories', Interrogatory No. 9 were included in their job responsibilities and to what extent each of the activities occupied their time.[4] Those responses in percentages of time were translated into *salary dollars* which were then used as the *basis for allocation of district costs.*" (emphasis supplied)

It will be noted that there are 12 Districts. District 2 was used as the basis for calculation of costs and allocation of the remaining 11 Districts.

The Beans' work papers supporting the Beans' Study indicate that three individuals, Messrs. Strick, Lewinski and Linder, were requested to estimate the percentage of

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[4] The relevant portions of the Answer of CWA Defendants to the Plaintiffs First Amended Interrogatories are set forth in Appendix B, hereto attached.

their time spent in 21 different activities during the period April 1, 1977 through March 31, 1978.[5] Later six additional individuals (Messrs. Angel, Dinkin, Mazzi, O'Connel, Jr., Sangmeister and Ms. O'Hara), also in District 2, were asked to go through the same procedure.

The salaries of the first three individuals were allocated by their percentages; all the District 2 expenses were allocated on the basis of the average percentage of the nine individuals (the first three plus the additional six). The overal percentage of District 2 expenses were then allocated to the 21 categories and then assigned to the first seven columns on the Beans' Study.

In the Beans' work sheets there is no reference to any time records kept contemporaneously by the nine individuals and Mr. Beans, in his testimony, indicates that no such records were kept. This was confirmed by the testimony of the nine individuals. With one exception, there is no allocation of salaries and expenses by *functions.*

Mr. Ross, in his testimony, stated:

> "I have very strong feelings and opinions regarding the Districts. My professional opinion tells me that the procedure used in distributing the cost into various categories is both inconsistent and generally lacking because of the inherent data base deficiency I will call it."

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[5] The 21 activities are: 1. Grievance up to arbitration; 2. Arbitration; 3. Administration of collective bargaining agreement; 4. Preparation and negotiation; 5. Organizing; 6. Conducting Union meetings; 7. Labor legislation; 8. Strike and picket activity; 9. Recreation and social activities; 10. Retirement, etc.; 11. Training; 12. Publications; 13. Political activities; 14. Presentation of Court activities; 15. Defense of Court activities; 16. Activities re impr. terms and conditions; 17. Reports and References to Agreements; 18. Monitoring local offices; 19. Community Affairs; 20. C.O.P.E.; and 21. Per Capita Contrib.

Mr. Ross further noted that there were extensive variations within the 21 activities, individual by individual. He also testified that there were no studies or evaluations made to support the percentage used by any of the individuals involved. There were no contemporaneous records, and no specific identification of direct costs, that is, costs directly chargeable to any one of the seven columns. There was, in effect, a co-mingling of direct costs—such as salaries—and indirect costs such as some administrative overload of the District. Furthermore, all District costs are allocated on the basis of salaries which were developed on the percentage of nine individuals without any causal or beneficial relationship between salaries and some of the other expenses incurred at the District level. The cost analysis is based on the recollections of nine individuals in one of the 12 Districts whose salaries total approximately $200,000 but which are used to allocate some $10,000,000 for the 12 Districts. Nor was there any evidence in the Beans' work sheets to support the conclusion that there was a relationship between costs in District 2 and the remaining 11 Districts.

There are well established bases which might have been used by CPAs in determining various costs, such as occupancy costs, stationery supplies and postage, set out by AICPA, but these established bases were not used in the Beans' work sheets and the Beans' Study.

There is no sufficient evidence that Headquarters personnel of CWA engage in the same activities and in the same percentages as CWA representatives. CWA has apparently "presumed" that this ratio exists, but this "presumption" was repudiated by Mr. Beans himself on cross-examination. He testified (Transcript 3-13-80, page 91):

> Q Mr. Beans, what would have been the effect of your study if, rather than taking the direct personnel

as the basic time-expense unit, you had taken the same number of Headquarters staff people?

A I don't know.

Q So there is no basis for saying that Glenn Watts' time and George Strick's time are spent on the same activities, in the same ratio?

A In that context, no.

Q And there is no basis for saying that Ed Lewinski's time and Mr. Watts' time are spent on the same activities, in the same ratio, is there?

A No, not taken in that context.

Nor do some of the officers and employees of CWA consider the retroactive attempted reconstruction of time spent by its officers and employees to be more than speculation and guesses. For example, CWA Vice President, Morton Banr observed in Exhibit 1853, at page 160, "I said this was an uneducated guesstimate." He indicated to the Secretary-Treasurer that filling out the form was "guess work" and that it was "impossible to be anywhere near accurate" in filling out the form. (Id. page 159)

Grace Ann Leonard, a witness for CWA, is a CWA representative and on its staff since October, 1972. Before 1972, she was Secretary-Treasurer of Local 2336 in Washington, D.C. She testified in regard to her participation in grievance procedures. When asked what percentage of her time was spent upon the grievance procedure, she stated: "These are going to be just estimates, because I don't keep an accurate daily log of my time, but the time spent—and this is a best estimate—I would have to say about 50 per cent, and that would include activities that I've just described, with the traveling and the internal communication with the company, and the hearing," (Testimony 2-7-80, page 12).

On cross-examination, she testified:

Q Do you keep any time records or daily logs of your activities?

A No. I wish I did.

Q And you haven't since January 1, 1976, have you?

A Kept a time record or a daily log?

Q Yes.

A No, sir.

Q And I gather from the hesitancy of your testimony that you question the accuracy of your percentages that you have given?

A Yes, I can't be sure. Because I haven't kept a record, it's hard to describe, or it's hard for me to describe the actual time or percentage of time.

Q In fact, it's well nigh impossible; isn't it?

A Yes. (Id. page 46)

On redirect testimony (by Matthew A. Kane, Esquire, attorney for CWA), she testified in respect to the 12% figure for "Administration":

"Matt, I think I would just be guessing to try to give you an answer honestly." (Id. page 64)

"I just can't be sure. It's pure speculation, Matt; I'm sorry." (Id. p. 65)

Other witnesses for CWA referred to the percentages as "guesses".

Nor was the testimony of the nine individuals used in this allocation more reassuring than that of Ms. Leonard.

Mr. Strick in referring to the various estimated percentages of time spent was often not definite, stating that the percentage was "about" the percentage given (T. 2-6-

80, pages 33, 41, 52), or was "less than" the percentage given, without stating how much less (T. 2-6-80, pages 34, 52, 53, 58 and 66).

On cross-examination, it was stated:

> "Q When you say 'estimate', you really mean 'guess' don't you?
>
> A I don't know if the two are synonymous or not. Maybe they are." (T. 2-6-80 page 98)

Here too, there were instances in which pages in his appointment calendar were blank and he was unable to state what services he performed on those blank days. (T. 2-6-80 page 100)

Mr. Lewinski, in his testimony, often stated his percentages in the alternative, such as "a good 20 or 25% of my time" (T. 2-7-80, page 18), "a good one, two percent" (Id. page 78). He also indicated that the percentage was "less" than the percentage given (Id. page 30), and that the percentage was "about" an alternative percentage (Id. 30). He also characterized his "estimates" as "guesses", stating: "I guess, overall, about 6.78 per cent of my time. It varies." (Id. page 31) and, again, "I guess about 4 or 5 per cent, totally." (Id. page 32)

Mr. Linder, testified that during the period since the fall of 1976, there had been substantial changes in his duties and activities and stated:

> "Yes, to tell you the truth, it is a rather difficult thing to do because there has been substantial change and what I attempted to do is to try to visualize a typical year because my operation, its almost a crisis-to-crisis situation, and you just don't—time gets away from you." (T. 2-7-80, page 31)

The testimony of the remaining six of the nine individuals was equally unsatisfactory.

Mr. Dinkin on cross examination stated:

> Q Now when you say those percentages on Exhibit TT represent your best estimates they are really your guess as to what transpired over the past year.
>
> A Well, I set down when I get this request—to the best of my knowledge, I went back and in my own mind estimate how I spent my time for the year, and its really not precise. I know that, but its the best estimate I could come up with." (T 2-8-80, page 30)

Mr. Mazzi, in several instances when asked about various items in connection with which he had stated in Exhibit UU he had expended time, frankly stated: "I honestly don't remember," (T. 2-8-80, pages 25, 31) or "I've forgotten the time frame." (Id. page 24).

Mr. O'Connell, in regard to the time spent by him in negotiating six contracts, stated: "Fifteen to 19 per cent, something along in there." (T. 2-8-80, page 9) He stated, in regard to several items that he spent "about" the percentage indicated. (Id. pages 12, 13, 15).

Mr. Sangmeister had difficulty in remembering various items stating "I don't remember" or "I don't recollect" a number of times. (T. 7-8-80, pages 29-30, 31, 32, 33, 34, 35, and 37).

Ms. O'Hara testified in regard to various percentages, "a very small percentage (T 2-8-80, pages 17, 22) and in regard to time spent on Grievances, stated on cross-examination:

> Q Did you write the 25 percent opposite grievances?
>
> A To the best of my knowledge, no, I did not."

The Special Master necessarily must conclude from the testimony of the nine individuals that the percentages given or attributed to them are indeed mere guesses and speculation and the salaries cannot reasonably be used as

the basis for the allocation of expenditures in this case. He so rules.

Then too, the Special Master notes that CWA did not produce as witnesses some 30 employees actively engaged in various projects for CWA.[6] There was no evidence produced that these witnesses were not available and able to testify if called. The Special Master draws the inference from this failure to produce these witnesses that their testimony in regard to their being engaged in "collective bargaining, contract administration or grievance adjustment" would have been unfavorable to CWA. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S. Ct. 467, 474, 83 L.Ed 510 (1939), and *International Union, (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir., 1972).

The adverse inference drawn is supported by a number of documentary exhibits introduced by the Plaintiff indicating that most of the 30 employees mentioned in Note 6 are presently engaged in activities which are not "collective bargaining, contract administration and grievance adjustment."

The Special Master also notes that the CWA witnesses, Glenn Watts, Louis Knecht and James Gee all testified without being asked to qualify their time spent upon CWA projects.

The Special Master accepts the opinions and observations of Mr. Ross in regard to the District items. These

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[6] The 30 employees not called are:

James Booe and his working team, Loretta Bowen, Gerber, M. Miller, Morgan and Sisson; Patsy Fryman and her working team, Clark, Foreman, Kulstad and Mays; John Carroll and his working team, Abraham, Atkins, Burch, Foged, Kent, Miller, Stadelmyer, Straw and White; those working under the Secretary-Treasurer, Knecht, i.e. Webb, Shepperson and Hassen; Executive Vice Presidents Cramer, Miller and Hackler and their assistants Hipple, Ferguson and Confer.

opinions and conclusions, together with the other relevant testimony and exhibits, the failure to produce the testimony of certain witnesses by CWA and the reasonable inferences to be drawn therefrom, have lead the Special Master to conclude that the Defendants have not met their burden of proof in regard to the expenditures under the heading "Districts", and he is of the opinion that no part of such expenditures under the heading "Districts" set forth in the Collective Bargaining, Grievance and Contract Administration columns in the Beans' Study are permissible charges and holds that they are impermissible.

W. E. Installation; W. E. Sales and Long Lines

Under the "Collective Bargaining" column, Mr. Beans has allocated $33,970 for "W. E. Instalaltion"; $27,749 for "W. E. Sales" and $31,969 for "Long Lines", a total of $93,688. Under the column "Grievances", he allocated $56,616 for "W. E. Installation", $46,248 for "W. E. Sales" and $53,282 for "Long Lines", a total of $156,146. Unde rthe "Contract Administration" column, he allocated $135,880 for "W. E. Installation", $110,978 for "W. E. Sales" and $127,877 for "Long Lines", a total of $374,705. The grand total of these items for the three columns mentioned is $624,539.

These three line items were referred to in the Beans' work sheets as independent unit expenses. H requested two of the National Directors of Western Electric Installation and AT&T Long Lines to estimate their time spent on the seven classifications. They gave their percentages for the first three of the seven categories (Columns 1, 2 and 3) and these percentages were then used to allocate the $624,539 in expenditures.

Here again, Mr. Ross was of the opinion that the procedures—like the ones used in regard to "Districts", *supra*—were not in accordance with generally accepted

principles of cost accounting and that the data base was inadequate. There were no contemporaneous time records maintained by the two Directors mentioned who were asked to record percentages of time spent some two or two and one-half years before, and no causal or beneficial relationship was established between the time when the two individuals were interviewed and the expenses of the three independent units.

For substantially the same reasons given for the holding of the Special Master that the "District" expenditures were impermissible, and based upon the opinion and conclusions of Mr. Ross, together with the relevant testimony and exhibits and the reasonable inferences to be drawn therefrom, the Special Master concludes that the Defendants have not met their burden of proof in regard to the expenditures listed in the first three columns under the headings "W. E. Installation", "W. E. Sales" and "Long Lines", amounting in the aggregate to $624,539 as permissible items and holds that they are impermissible.

The Record in this case does not indicate why CWA, after the decisions of the Supreme Court in 1963 in *Allen* and *Street*, both supra, did not establish a system for the keeping of contemporaneous time sheets by its upper echelon officers and employees, indicating the function for which such time was expended, so that the Union would have some credible basis for meeting its burden of proof (see *Allen*, supra) in regard to possibly impermissible items. The establishment of such a system would also appear to have been helpful to CWA in determining its costs for the functions in which it was engaged. Such a system has been established rather generally in the legal profession, whose members frequently charge their fees on the basis of their professional services supplied their clients, and there does not appear to be any substantial difficulty in establishing such a system for unions as well.

In any event, however, the uncontradicted evidence in this case is that no such system was established by CWA and its absence has in large part resulted in the necessary holding by the Special Master that the above items are impermissible in this case because of a failure by CWA to meet its burden of proof.

Negotiations

The item "Negotiations" relates to the negotiation of a collective bargaining agreement and is in the amount of $137,000 under Column 1, Collective Bargaining. This item is clearly permissible and the Special Master so holds.

Education

The item of Education allocated under the first three columns is as follows: "Collective Bargaining" $5,000; "Grievance" $2,000; and "Contract Administration" $22,000, a total of $29,000. Later in the Beans' Study is an additional "Education" item which is allocated under the first three columns as follows: "Collective Bargaining" $19,000; "Grievance" $7,000; and "Contract Administration" $83,000, a total of this second Education item of $109,000. The grand total of the two "Education" items is $138,000.

In regard to the "Education" items, the Beans' work sheets and supporting materials indicate that the costs of the CWA training were based upon four training programs and project codes within the training programs. A study was made of the number of training modules shipped to each District and the amount of training time required for each module. Each module's percentage relationship to the total was developed based upon the ratios of the number of modules multiplied by the amount of training time. The amounts were then allocated to the seven headings in the Beans' Study. The salary of the Education Director, his expenses and sup-

port were paid from Account #22. The expenses of the training programs themselves, to the extent they were absorbed by CWA, were charged to Account #48, "Education". The salary and expenses are properly identified in the Account Numbers mentioned and the total amounts have been allocated not only to the first three columns, "Collective Bargaining", "Grievance" and "Contract Administration", but also to the next four Columns, "Organizing", "Labor Legislation", "Community Services" and "Political", the last four Columns having already been held to be impermissible. In short, part of the "Education" expenditures are permissible and part are impermissible.

In the opinion of the Special Master, the Defendants have met the burden of proof that the portion of the "Education" expenditures allocated to the first three Columns are permissible and the total amount of those allocations, i.e., $138,000, is held to be a permissible expenditure.

Finance and Office Operations

In the Beans' letter of January 31, 1980, it is stated in regard to this item:

> "Finance and Office Operations—This includes the accounting and other offices involved in the financial management of the Union in that the dues processing and membership records functions require a disproportionate share of the total time and effort in this area, these activities were identified and classified as contract administration with the balance of the functioning being classified as administrative."

The Beans' work sheets and Mr. Beans' testimony (2/15/80, pages 70-71) indicate a list of salaries taken from payroll records of CWA during a conference with members of the acocunting department in regard to which persons were assigned to membership dues and data

processing areas. The data processing functions amounted to 31.88% of the total and the accounting and operations to 68.12%. The data processing figure based on the percentage mentioned amounted to $1,207,000 which was allocated to Column 3—"Contract Administration" —and the balance of $2,579,000 was allocated to Column 8—"Administrative".

In the opinion of the Special Master, the Defendants met their burden of proof in the allocation of $1,207,000 to Contract Administration and this amount is held to be permissible.

Development and Research

The next item for consideration is "Development and Research". In the Beans' Study, the amount of this item is $678,000, of which $252,000 is allocated to Column 1 —Collective Bargaining—and $416,000 to Column 8—Administration.

The Beans' work sheet on this subject indicates that this department is staffed primarily by economists and statisticians. They conduct studies and analysis to provide support for CWA's bargaining demands. They also conduct studies of the economic impact of various changing conditions. The allocations of the amount of this item, referred to above, appear to the Special Master to be reasonable and that CWA has met its burden of proof in regard to this item. The sum of $252,000 allocated to Column 1—Collective Bargaining—is consequently held to be permissible.

Legal

In the Beans Study, a substantial part of the expenditures of CWA for legal services are apportioned to: Column 1—Collective Bargaining—$55,000; Column 2—Grievance—$1,415,000; and to Column 3—Contract Administration—$31,000.

The Beans' letter of January 31, 1980, states in regard to this item:

> "Legal—Based on a review of the project codes assigned within the accounting system, and an analysis of certain of those codes, legal expenses were allocated to that activity, which appeared to give rise to the action."

The Beans' work sheets indicate a careful and complete allocation of the legal expenses by 18 project codes. Each check is identified, the name of the attorney given, and the nature of the service rendered is stated. This item is the best documented item of expenses thus far considered and the allocations among the first three Columns are, in the opinion of the Special Master, proper. CWA has met its burden of proof in regard to the items and the amounts allocated to the first three Columns, i.e., Column 1—Collective Bargaining—$55,000; Column 2—Grievance—$1,415,000; and Column 3—Contract Administration—$31,000, a total of the three allocations of $1,501,000, is held to be permissible.

Other Committees and Conferences

In the Beans' letter of January 31, 1980, it is stated in regard to this item:

> "Other Committees and Conferences—Individual Committees and Conferences were allocated to which it appeared that each was most closely related."

On the Beans' Study, the expenses for this item are allocated as follows: Column 1—Collective Bargaining—$67,000; Column 3—Contract Administration—$2,400; and to Column 8—Administration—$35,000. In CWA's books there are Project Codes into which the various items of expenditures are placed. In the Beans' work sheets, the totals of these Project Codes are then allocated to the eight Columns on the Beans' Study. The Special Master is of the opinion that the Defendants have not

met their burden of proof in regard to one of the items allocated to Column 1—Collective Bargaining—i.e., "W. E. Material Management Center Coordination Committee —$2,200."

The W. E. Installation and W. E. Sales items have already been held to be impermissible and the Defendants have not met their burden of proving that the W. E. Material Center Coordination Committee expense is directly connected with collective bargaining or necessary for its effectuation.

This item of $2,200 is held to be impermissible and should be subtracted from the $67,000 allocated to Column 1—Collective Bargaining, thereby reducing that amount to $64,800 which is held to be permissible. The amount of $2,400 allocated to Column 3—Contract Administration—is held to be permissible. This makes a total of $67,200, rounded off is $67,000.

CWA News and Newsletter

CWA News is a monthly, newspaper style publication sent to members of CWA (but not to the Agency Fee Payors). Its articles cover the entire field of CWA interests and activities. The expense of producing and mailing the publication, including the salary of the editor and his secretary, are paid out of Account # 035 "CWA News", so that the expense figures for this item are readily available. Salaries and personnel expenses are apportioned as 12% of the newspaper budget, the balance being production costs.

Mr. Beans in his letter of January 31, 1980, and in his testimony, indicated that the allocations of the expenses included in Account # 035 were based upon the space utilized by the various articles to one of the eight classifications. On this basis, which the Special Master finds to be reasonable, the following relevant allocations were, e.g.: 22.12% was allocated to Collective Bargaining,

2.11% to Grievances, .89% to Contract Administration and 31.8% to Administrative. Thus, in the Beans' Study, $82,600 was allocated to Column 1, "Collective Bargaining"; $7,900 to Column 2, "Grievances" and $3,300 to Column 3, "Contract Administration". The Special Master finds that CWA met its burden of proof in regard to these three items, a total of $93,800, rounded off to $94,000 is held to be permissible.

Pension Fund; Insurance, Hospitalization and Bonds; Taxes; Staff Moves; and Staff Illness Absence

Mr. Beans, in his testimony and on his work sheet 16-1, considered these items together under the heading "Fringe Benefit Distribution". This was logical inasmuch as the amounts of the items were allocated among the Seven Columns of the Beans' Study in the preparation of the salary distribution following the procedure already mentioned in regard to 'Districts'. The Pension Fund Budget Account Number is # 036, Insurance, # 037 and Taxes, # 038.

Using the percentages derived from the apportionment of salaries, Mr. Beans then allocated the following amounts under the first three columns and the eighth column as follows:

	Collective Bargaining	Grievance	Contract Administration	Administration
%	20.39	22.88	22.88	22.16
Pension Fund	578,000	636,000	635,000	616,000
Insurance, Hospitalization & Bonds	239,000	263,000	262,000	254,000
Taxes	127,000	140,000	140,000	136,000
Staff Illness Absence	11,000	12,000	12,000	12,000

For the reasons above set forth in regard to "Districts", pages 15-17, supra, the Special Master has concluded that

the Defendants have not met their burden of proof in regard to the expenditures under the headings, Pension Fund; Insurance, hospitalization and bonds; taxes; Staff moves; and Staff illness absence, all mentioned above and he is of the opinion that no part of such expenditures set forth in the Collective Bargaining, Grievance and Contract Columns of the Beans' Study is permissible and holds that these expenditures are impermissible.

Collective Bargaining Policy Committee

In the Beans' Study, "$10,000 has been allocated under Column 1—Collective Bargaining" for the expenditures for the Collective Bargaining Policy Committee. These expenditures are, in the opinion of the Special Master, clearly permissible as directly connected with Collective Bargaining and reasonably necessary to its effectuation. He holds that they are permissible.

Publicity and Public Relations

In the Beans' Study $202,000 is allocated to Column—"Collective Bargaining" and $915,000 to Column 8—"Administrative".

The bulk of these expenditures is for contract services including the purchase of air time to broadcast commercials in connection with upcoming national bargaining. The Special Master notes that Mr. Watts, President of CWA, indicated that the item named be classified as "Organizing". The Special Master is of the opinion that the Defendants have not met their burden of proving that any part of this item is directly connected with collective bargaining or is reasonably necessary for its effectuation, and from a consideration of the testimony, exhibits and reasonable inferences therefrom, considers that the $915,000 allotment to Column 1—"Collective Bargaining" is impermissible and so hold.

Foreign Affairs

In Mr. Beans Study, he places expenditures of $216,000 for "Foreign Affairs" under Column 1, "Collective Bargaining".

The Foreign Affairs Fund is used by CWA to pay the expense of CWA personnel participating in various international labor negotiations and functions. For example, one of these CWA and Deutsche Postgewerkschaft participate in joint trade union seminars in order to learn about each other's organization and country. Exhibit 849 indicates that: "All travel, food and lodging expense for the seminar participants and their spouses (are) paid by CWA out of the Foreign Affairs Account. Lost time for the Local Union participants will also be borne by CWA."

The theory of allocating these expenditures to Column 1 "Collective Bargaining" is because they allegedly are directly related to wages and working conditions in foreign countries which export products to the United States and thus affected job conditions and job opportunities of United States workers. In the opinion of the Special Master, however, there is insufficient proof of such an alleged effect and the Special Master concludes from the testimony, exhibits and reasonable inferences drawn therefrom that the Defendants have not met their burden of proving that these expenditures are directly connected with Collective Bargaining and are reasonably necessary for the effectuation thereof. These expenditures are therefore held to be impermissible.

Professional Fees

Professional fees of $141,000 have been allocated to Column 1, "Collective Bargaining" in the Beans' Study. This item contains expenditures from auditing, actuarial studies and other professional services other than legal services. It includes special actuarial studies and community services in support of collective bargaining.

The Special Master finds that the Professional Fees are directly connected with Collective Bargaining and are reasonably necessary for its effectuation and holds them to be permissible.

Contract Reports and Ratification

In the Beans' Study, expenditures of $6,300 are allocated under Column 1, "Collective Bargaining". Later in the Beans' Study there an item "Contract Report and Ratification" Fund in the amount of $441,600, a total of the two items of $447,900 rounded off to $448,000. These expenditures are directly connected with collective bargaining, are reasonably necessary for its effectuation and are held to be permissible.

Defense Fund

The expenditures for the Defense Fund amount to $1,324,000, all of which has been allocated to Column 1, "Collective Bargaining" in the Beans' Study.

The basic purpose of the Defense Fund is to establish benefits in the event of a strike. The use of the Fund and eligibility for strike benefits are contained in a pamphlet entitled "Defense Fund Rules". By the action of the CWA Executive Board all employees—agency fee payors and members alike—who honor a picket line are entitled to benefits from this Fund.

An examination, however, of Statement No. 5 entitled "Defense Fund" for the CWA year ended March 31, 1978, of the Annual Audit of Main, Latrentz & Co. (Defendants's Exhibit W-2), showing the expenditures for that year of $1,324,000 does not disclose that any of the expenditures were in connection with the C & P Telephone Company employees. One item listed was an expenditure of $500,000 for the United Mine Workers, obviously not an expenditure for the C & P Telephone Company employees. Other evidence has indicated that the expenditure of $429,000 for "National Collective Bargaining" does relate to the C & P Telephone Company employees.

The Plaintiffs earnestly contend that no part of the Defense Fund is permissible inasmuch as a strike only comes into being when there is a *failure* of collective bargaining, and should not be charged to "Collective Bargaining" for that reason. The Special Master does not accept this contention in that the right to strike and a strike itself is the ultimate sanction the Union may use in connection with its collective bargaining efforts and thus is directly connected with collective bargaining and may well be necessary for its effectuation.

The Special Master is of the opinion that items of expenditure from the Defense Fund in connection with or for the benefit of the C & P Telephone Company employees is a permissible expense and properly charged to the Agency Fee Payors. The Defendants have met this burden of proof in this regard for the expenditure of $429,000 under the heading "National Collective Bargaining" and this expenditure is held to be permissible. The balance of $895,000 of the Defense Fund allocated to Column 1—Collective Bargaining is held to be impermissible.

Administration

The Special Master is of the opinion that a proper proportion of permissible expenditures allocated in the Beans Study to Column 8—"Administrative" should be allocated to Column 1—"Collective Bargaining", Column 2 "Grievances" and Column 3—"Contract Administration", respectively. In the Beans Study the total of this total to Column 1—Collective Bargaining was $2,191,000, to Column 2—"Grievance" was $2,406,000 and to Column 3—"Contract Administration" was $2,372,000. There were also substantial allocations of the total of Column 8 "Administrative" to Column 4—"Organizing", Column 5 —"Labor Legislation," Column 6—"Community Services" and Column 7—"Political", but inasmuch as the expenditures in columns 4, 5, 6 and 7 have already been held to be impermissible, it is not necessary to consider further the allocation of parts of Column 8—"Administrative" total to Columns 4, 5, 6 and 7.

The various expenditures listed in Column 8—"Administrative" must now be considered, some of which are permisisble, some impermissible and some are partly permissible and partly impermissible. Only the permissible items of expenditure in Column 8—"Administrative" will be considered in the ultimate allocation to Columns 1, 2 and 3.

Turning then to a consideration of the item of expenditure allocated in the Bean's Study to Column 8—"Administrative", one finds as the first expenditure the amount of $652,000, designated "Administrative" under the heading: "Departments". This part of the total expenditure of the Administration Department of $721,000 of which $69,000 was allocated to Column 7—"Politics", two employees with their expenses and other miscellaneous expenses, amounting to $69,000.

It is clear, however, that the other officers and employees whose salaries and expenses are included in the amount of $652,000 performed services which the Special Master has held to be impermissible, such as organizing, labor legislation community services and the like. There were, however, no time sheets or contemporaneous memoranda indicating a breakdown of the time sheets and there was no proper analysis of the vouchers for various expenses to determine their proper allocation by function. The situation here is like the situation relating to the "District" expenditures and the Defendants have failed to meet their burden of proving which salaries and expenses or parts thereof are permissible. The Special Master holds that all of the expenditures of $652,000 allocated to Column 8—"Administrative" are impermissible.

Finance and Office Operations

This second item of expenditure of $2,579,000 is under the heading "Finance and Office Operations". As already indicated above, $1,207,000 under the same heading was allocated under Column 3—"Contract Administration",

which the Special Master held to be permissible. For the same reasons, the Special Master holds that the expenditure of $2,579,000 was properly allocated to Column 8 "Administrative" and will be considered to be a part of this column for future allocation.

Development and Research

This third item of expenditure of $416,000 is under the heading "Development and Research". As indicated above, $252,000 of the total amount of $678,000 was allocated under Column 1—"Collective Bargaining" which the Special Master held to be permissible. For the same reasons the Special Master holds this expenditure of $416,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of the Column for future allocation.

Legal

The fourth item of expenditure of $160,000 is under the heading "Legal". As already indicated above, a substantial part of the expenditure of CWA for legal services was allocated to the first three columns, i.e., Column 1—"Collective Bargaining" $55,000; Column 2—"Grievances" $1,415,000; and Column 3—"Contract Administration" $31,000. All of these three allocations were held to be permissible and for the reasons above stated, the Special Master holds this expenditure of $160,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of this Column for future allocation.

Convention and Related Committees

The fifth item of expenditure of $367,000 is under the heading "Convention and Related Committees". This is the total amount of expenditure for this item, no part of it having been allocated to any of the Columns 1-7.

The Convention is the highest governing authority of CWA, subject to the right of referendum to the Union's

membership. The convention meets each year between June 1 and August 31. It is composed of the elected officers of CWA plus local delegates in proportion to the membership of the local unions.

The Convention has sole authority to establish per capita dues for the National Union, to establish minimum dues to be charged by each local union, to fix the compensation of the elected CWA officers, to elect its president, its Executive Vice President and its Secretary-Treasurer every three years. It also decides appeals from internal union trial boards as well as appeals from action of CWA or its local union or of their officers or governing bodies alleged to be in violation of the CWA constitution, local by-laws or of the rights and privileges of union members.

It is clear that the expenditure for the related committees are directly connected with collective bargaining, grievances and contract administration and are reasonably necessary for their effectuation. The Special Master finds that the Defendants have met their burden of proof in regard to this item and the expenditure of $367,000 is held to have been properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Executive Board

The sixth item of expenditure of $158,000 is under the heading "Executive Board". The Executive Board is charged with governing the affairs of CWA between conventions and the same considerations already mentioned in regard to "Convention and Related Committees", supra, are applicable to the "Executive Board". The Special Master finds that the Defendants have met their burden of proof in regard to this item and the expenditure of $158,000 is held to have been properly allocated to Column 8—"Administrative" and will be considered to be a part of the Column for future allocation.

Other Committees and Conferences

As noted above under the same heading the seventh expenditure of $35,000 was allocated to Column 8—"Administrative". In the Beans' Study $67,000 was also allocated to Column 1—"Collective Bargaining" and $2,400 to Column 3—"Contract Administration". The Special Master found that the Defendants did not meet their burden of proof in regard to an item of $2,200 which was a part of the $67,000 allocated to Column 1—"Collective Bargaining". The $2,200 item was deducted from the $67,000 and the balance of $64,800 was held to be permissible. The Beans' work sheets 14-1 and 14-2 indicate the Defendants have met their burden of proof in regard to the $35,000 item and the expenditure of $35,000 is held to have been properly allocated to Column 8—"Administrative", and will be considered to be a part of that Column for future allocation.

CWA News and Newsletter

This eighth item of expenditure of $119,000 was allocated to Column 8—"Administrative". The Special Master has already considered the method of allocation of the CWA News and Newsletter expenditures and has held that the $82,600 allocated to Column 1—"Collective Bargaining", $7,900 to Column 2—"Grievance" and $3,300 to Column 3—"Contract Administration" were permissible and for the same reasons holds that the expenditure of $119,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of that Column for future allocation.

Pension Fund; Insurance, Hospitalization and Bonds; Taxes; Staff Moves; Staff Illness Absence

The items of expenditure under these various headings have already been listed above for Column 1—"Collective Bargaining", Column 2—"Grievance", Column 3—"Contract Administration" and Column 8—"Administrative". The amounts of expenditure allocated to Column 8—"Administrative" are as follows:

Pension Fund	$616,000
Insurance, Hospitalization and Bonds	254,000
Taxes	136,000
Staff Moves	24,000
Staff Illness Absence	12,000

For the reasons already given in holding that the allocations to Columns 1, 2 and 3 are impermissible, the Special Master holds that in regard to these items allocated under Column 8—"Administrative", the Defendants have not met their burden of proof and these items of $616,000, $254,000, $136,000, $24,000 and $12,000, respectively, will not be included in Column 8—"Administrative" for future allocation.

Contingency

The amount of the item for "Contingency" is $90,000 all of which is placed by the Beans' Study in Column 8 —"Administrative".

This item is to cover unforeseen expenditures during the fiscal year. The amount is the same as was used in the preceding fiscal year 1976-77. It appears to be reasonable and the Special Master finds that the Defendants have met their burden of proof in regard to this item and holds that the amount of $90,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of that Column for future allocation.

Equipment Additions

This item of $189,000 was allocated under the heading "Equipment Additions" to Column 8—"Administrative".

The entire amount of this item, $189,000, appears in CWA Account No. 41 and covers new and replacement office equipment and furnishings for the National Office. The Special Master finds that the Defendants have met their burden of proof in regard to this item to $189,000 and holds that it was properly allocated to Column 8—

"Administrative" and will be considered to be a part of that Column for future allocation.

Building Operations

The expenditures for this item of $915,000 were entirely allocated to Column 8—"Administrative" and appear in CWA Account No. 44.

This item covers the maintenance, repair and operating costs of the building owned by CWA as well as minor repairs to leased offices. The Special Master finds that the Defendants have met their burden of proof in regard to this item of $915,000 and holds that it was properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Professional Fees

This item consists of $24,000 allocated to Column 8—"Administrative". The Special Master has already considered an allocation of expenditure for Professional Fees of $141,000 under Column 1—"Collective Bargaining" and held that item to be permissible. For the same reasons given above in regard to item $141,000, the Special Master finds that the Defendants have met their burden of proof in regard to this item of $24,000 and holds that it was properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Affiliation Dues

This entire item of $1,090,000 is allocated under the heading "Affiliation Dues" to Column 8—"Administrative".

CWA pays affiliation dues to the AFL-CIO based upon its membership count (which does not include the Agency Fee Payors). This item amounts to $1,090,000. In addition, CWA pays dues to the Postal Telephone and Tele-

graph International (PTTI). Prior to the budget year 1977-80, the PTTI dues were paid from the Foreign Affairs Account. The Special Master has already held that the expenditures from the Foreign Affairs Account are impermissible for the reasons given above.

In regard to the $1,090,000 item, there is no testimony that the activities of the AFL-CIO, or of PTTI for that matter, participate in collective bargaining, grievance adjustment or contract administration of the contract with the C & P Telephone Company, or, indeed, with any Bell System operating company.

The documentary exhibits indicate that AFL-CIO engages in a wide field of activities not directly connected with collective bargaining, grievance adjustment or administration of the contract between CWA and the C & P Telephone Company. These activities include, e.g., urban policy, copyright revision and performance rights, truth in fund raising, foreign assistance, hospital cost containment, limited tax credit, a national health program, support for the NAACP membership dues, the soviet workers movement and the death of C. L. Dennis.

In the opinion of the Special Master, after considering the testimony and exhibits and the reasonable inferences to be drawn therefrom, the Defendants have not met their burden of proving that the expenditure of $1,090,000 or the activities mentioned are directly connected with collective bargaining, grievance adjustment or contract administration and reasonably necessary for their effectuation. That expenditure was improperly allocated to Column 8—"Administrative" and the Special Master holds that it will not be included in that column for future allocation.

Recapitulation

It will now be helpful to recapitulate the amounts of the permissible expenditures above set forth. Attached to this Report is *Appendix C*, being a *List of Aggregate*

Expenditures in the Beans' Study in Column 1—Collective Bargaining, Column 2—Grievance and Column 3—Contract Administration Which the Special Master Has Held to be Permissible. The total is $4,424,000. This total, however, does not include the allocation of that part of the portion of Column 8—"Administrative" which is properly allocated to the total of Column 1—Collective Bargaining, Column 2—Grievance and Column 3—Contract Administration.

As a preliminary to making the proper allocations of portions of Column 8—"Administrative", attached to this Report is *Appendix D* which is a *"List of Expenditures in Column 8—Administrative in the Beans' Study Which the Special Master Has Held to be Permissible"*. The total is $5,052,000.

Calculations of Percentages

Mr. Beans allocated the total expenditures in Column 8—"Administrative" among the first seven columns on the basis of the proportion of dollar totals of the first seven columns to the total amount of expenditures (less the total of Column 8—Administrative), during the fiscal year ending March 31, 1978.

For example, the total expenditure for that fiscal year was $29,240,077.58. From this amount was deducted $8,064,516.54, the total amount of Column 8—"Administrative" leaving a balance of expenditures excluding the total of Column 8, of $21,175,561.04. This figure he divided into the respective totals of the first seven columns to reach the percentage of the total of Column 8—"Administrative" to be allocated to each of the first seven columns. In Column 1—"Collective Bargaining" of the Beans' Study the total of that column was $5,754,418.25 so that dividing the $21,175,561.04 net total into $5,754.418.25, the percentage figure of 27.1% was reached.

The Special Master will use this Beans' method of allocation of the permissible expenditures in Column 8—

"Administrative", which amount to $5,052,000 as above set forth and as appear in Schedule D.

For convenience, the Special Master has consolidated in his analysis, supra, the permissible amounts in the first three columns, i.e., Column 1—Collective Bargaining, Column 2—Grievance, and Column 3—Contract Administration. The total of these first three columns is $4,424,000 as above set forth and as appears in Appendix C. Dividing the $21,175,561.04 figure into the $4,424,000, a percentage of approximately 24% is reached, so that 24% of the total of permissible administrative expenses, i.e. $5,052,000 or $1,212,000, is to be added to the $4,424,000 subtotal giving a figure of $5,636,000 for the grand total of permissible expenses. Dividing $29,240,000, the total of expenditures for the fiscal year ending March 31, 1973, into $5,636,000 a percentage figure of 19.24% is reached, rounded off to 19% of permissible expenditures which CWA may charge the Agency Fee Payors.

This means, of course, that CWA has improperly charged the Agency Fee Payors 81% of the dues paid by them to CWA.

The Special Master will also follow Mr. Beans' position that the fiscal year April 1, 1977, to March 31, 1378, is a reasonably typical year and will apply the percentage figures above set forth to all of the relevant times involved, beginning January 1, 1976, to and including the date of filing this Report in the District Court.

Allocation of Costs

Each side paid for the original copy of the transcript of the testimony for use by the Court and the Special Master, as well as for copies of the testimony for use by counsel for the parties. The amount paid to Levine & Associates, who took and transcribed the testimony by each side was $6,890.51. The total fees of the Special

Master in accordance with the agreement in regard to this through June 30, 1980, amounted to $29,330.69, the Plaintiffs paying one-half and CWA paying the remaining one-half. Additional fees will be payable to the Special Master for July and August, 1980, and will be added to the $29,830.69 already mentioned. The cost of the expert witnesses for the Plaintiffs, Irving B. Ross, amounted to $1,068.00 and the cost of the expert witnesses for CWA—Dr. Galenson, Dr. Littell, Dr. Wirtz and Mr. Beans—amounted to $4,709.07. In addition, CWA claims that it is entitled to the expenses of its witnesses and in lieu of itemizing, claims $30.00 a day for 27 days, or $810.00, which the Special Master finds to be reasonable and taxable as costs. The Special Master will recommend to this Court that all of the above mentioned items be taxed as costs in the case, and that these costs as well as all costs in the case be paid 81% by the Defendants and 19% by the Plaintiffs.

Counsel Fees

In the Complaint, the Plaintiffs claim reasonable counsel fees and punitive damages. Counsel for the Defendants have advised the Special Master that they will claim an allowage of reasonable counsel fees. Counsel for the respective parties, however, have indicated that their claims will be presented to the Court at a later stage of the proceedings in the case and that the submission of the case to the Special Master is without prejudice to, or waiver of, such claims. The Special Master approves of this procedure and considers the filing of this Report to be without prejudice to, or waiver of, those claims.

Findings of Fact

The Special Master makes the following findings of fact:

1. The items of expenditure by CWA during the fiscal year beginning April 1, 1977, and ending March 31, 1978

(Fiscal 1977-78), are characteristic of the expenditures of CWA for all periods from and after January 1, 1976.

2. The total expenditures by CWA during Fiscal 1977-78 are $29,240,000.

3. The expenditures by CWA for Fiscal 1977-78 for Administrative purposes amounted to $8,065,000.

4. Of the amount of expenditures by CWA for Fiscal 1977-78 for Administrative purposes of $8,065,000, 24%, or $1,212,000, were permissible expenditures as calculated on Schedule E, hereto attached, and should be allocated to the total of permissible items of expenditure for Collective Bargaining, Grievance Adjustment and Contract Administration.

5. The total expenditures for the 10 categories set forth in Appendix C, hereto attached, of $4,424,000, together with the amount of $1,212,000 mentioned in Finding of Fact No. 4, supra, a total of $5,636,000, are directly connected with, and are reasonably necessary for the effectuation of collective bargaining, grievance adjustment and contract administration and are permissible items of expenditure.

6. The percentage of total permissible expenditures of the total expenditures of CWA during Fiscal 1977-78 is 19%, as calculated on Schedule E, hereto attached.

7. The percentage of total impermissible expenditures of CWA during Fiscal 1977-78 is 81%, as calculated on Schedule E, hereto attached.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. It is proper for the Special Master to use as a rule or guide in determining whether or not items of expenditure by CWA are permissible and properly

chargeable against the amounts paid by the Plaintiffs as Agency Fee Payors to CWA that such item of expenditure is directly connected with and is necessary for the effectuation of collective bargaining, grievance and adjustment and contract administration.

2. "Collective Bargaining, Grievance Adjustment and Contract Administration" are properly defined as set forth in Pages 10 and 11 of this Report.

3. It is proper for the Special Master to use the expenditure of CWA for Fiscal 1977-78 as characteristic of the other periods of time involved in this action and to use such expenditures for the calculation of the percentage of permissible expenditures which may properly be charged to the Plaintiffs, as Agency Fee Payors of CWA, and the percentage of impermissible expenditures which may not be so charged.

4. CWA must refund to the Plaintiffs listed in Schedule F, hereto attached, 81% of the amounts heretofore paid by them to CWA as Agency Fee Payors including the amounts listed in Schedule F and such additional amounts up to the date of filing this Report as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court.

5. The Plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the Plaintiffs as Agency Fee Payors.

6. The items of expenditure mentioned under the heading "Allocation of Costs" on page 39 of this Report

are properly taxable as costs in this case and those costs, as well as any other costs in the case will be paid 81% by the Defendants and 19% by the Plaintiffs.

7. Claims for counsel fees or punitive damages are not passed upon by the Special Master and the filing of the Report is without prejudice to, or waiver of, any such claims.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. The Report of the Special Master be adopted and the aforegoing Findings of Fact and Conclusions of Law be adopted, applied and confirmed by the Court.

2. In view of the length of the Report of the Special Master and the substantial number of issues, exhibits and figures involved, the time within which the parties may file exceptions, if any, to the Report be enlarged from the 10 day period provided for in Federal Rule 33 (e) (2), to 30 days from the date of filing the Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully Submitted

Dated: August 18, 1980

/s/ Wilson K. Barnes
WILSON K. BARNES
Special Master

January 31, 1980

Mr. Louis B. Knecht, Secretary-Treasurer
Communications Workers of America
1925 K Street, N.W.
Washington, D.C. 20036

Dear Mr. Knecht:

In connection with your request, we have reviewed the activities of and expenses associated with the departments and programs of the Union for the purpose of determining the portion of member dues spent in connection with the various activities of the Union for the period April 1, 1977 to March 31, 1978.

The significant activities have been categorized as follows:

(1) Collective bargaining—includes research, preparation for and actual negotiation of the collective bargaining agreements; strike and picketing activity and other activities directly related to the improvement of terms and conditions of employment.

(2) Grievances—including handling and processing of grievances up to arbitration, trial and processing of arbitration cases and, prosecution of court actions arising from such cases.

(3) Contract administration—includes the administration of the collective bargaining agreement in effect at any given time, conducting meetings necessary for the Union to properly carry out its duties as the exclusive collective bargaining representative, carrying on activities which promote informed contact between bargaining unit employees and their representatives, training of staff people to assure competent representation, publishing information considered to be

necessary to the carrying out of CWA's duties as collective bargaining representative, defense of court actions to protect members of the bargaining unit from being wrongfully deprived of rights guaranteed by statute and by the collective bargaining agreement, collecting, crediting, managing and expending member dues and agency fee payer's dues equivalents and, preparing reports for regulatory agencies.

(4) Organizing—expenses incurred in connection with organizing employees not represented by a labor organization into bargaining units.

(5) Labor legislation—support of or opposition to legislative measures and administrative regulations which affect the subject of collective bargaining.

(6) Community services—participation in charitable and social activities which benefit the community and the well being of people in general.

(7) Political—includes "get-out-the-vote" campaigns, non-partisan election and political education, encouraging bargaining unit members to support candidates and policies positively affecting their wages, hours and conditions of work, and administrative support of the voluntary C.O.P.E. Fund.

(8) Administrative—those activities which benefit the organization as a whole, are necessary for the orderly operation of the union, and encompass a range of responsibilities which is so broad as to make specific allocation unfeasible.

Those programs and departments whose activities are, in general, concerned with one of the designated categories have been assigned to such category. However, in those instances in which the program or department

responsibilities were not so narrowly defined, it was necessary to allocate the costs to the various activities encompassed. Generally, the areas requiring allocation and the basis for allocation was as follows:

Districts—The staff of District 2 were asked to indicate which of the activities listed as activities of the Union in the, "Answer of CWA Defendants to Plaintiffs' First Amended Interrogatories", Interrogatory No. 1, were included in their job responsibilities and to what extent each of the activities occupied their time. Those responses in percentages of time were translated into salary dollars which were then used as the basis for allocation of district costs.

W.E. Installation, W.E. Sales, Long Lines—Expenses of these activities were allocated on the basis of discussions with two of the three National Directors as to their areas of responsibility and their estimate of time spent in each of the areas. Due to the close correlation of the time estimates from the two directors interviewed, we did not extend our review to a meeting with the third director.

Education—Since the educational programs are constructed on a series of modules, each available module was categorized into one of the enumerated activities. We then tabulated the various modules shipped during the period under study and developed the usage of the various modules which was then translated into training time. Educational expenses were then allocated on the basis of training time.

Administrative—The staff assigned to this area have broad responsibilities for the overall administration of the Union, however, two persons were indicated as having primary responsibilities for COPE and other political activities. The salaries for those persons, and a proportionate share of other office costs were classified as political.

Finance and office operations—This includes the accounting and other offices involved in the financial management of the Union. In that the dues processing and membership records functions require a disproportionate share of the total time and effort in this area, these activities were identified and classified as contract administration with the balance of this function being classified as administrative.

Legal—Based on a review of the project codes assigned within the accounting system, and an analysis of certain of those codes, legal expenses were allocated to that activity which appeared to give rise to the action.

Other committees and conferences—Individual committees and conferences were allocated to that activity to which it appeared that each was most closely related.

CWA News and Newsletter—This allocation was based on a review of the respective publications and an assignment, based on the space utilized, of the various articles to one of the activities.

Pension Fund—Contributions to the pension fund have been allocated in proportion to the salaries charged to each activity.

Insurance, hospitalization and bonds—The cost of employee benefit insurance (hospitalization, dental, etc.) were allocated on the basis of salaries. Bonding, casualty and other general business insurance expense was included in the administrative category.

Taxes—Payroll taxes were allocated on the basis of salaries, while personal property, sales and other general business taxes were included in administrative costs. Real estate taxes are included in the building operating costs.

Staff moves, Staff-illness absence—These items have been allocated on the basis of the salary distribution.

Administrative—The costs accumulated in the administrative category were allocated to the other activities in proportion to the costs accumulated within such categories.

As shown on the following schedule, Classification of Expenditures, these procedures produced the following results:

Activity	% of Dues
Collective bargaining	27.17
Grievances	29.83
Contract administration	29.41
Organizing	6.20
Labor legislation	2.27
Community services	3.35
Political	1.77

We have also included a reconciliation of expense categories used in this study with the total expenses shown in the annual audit report.

If you have any questions or comments, please do not hesitate to contact us.

Very truly yours,

CERTIFIED PUBLIC ACCOUNTANTS

BEST AVAILABLE COPY

COMMUNICATIONS WORKERS OF AMERICA

CLASSIFICATION OF EXPENDITURES

YEAR ENDED MARCH 31, 1978

	Collective Bargaining	Grievances	Contract Administration	Organizing	Labor Legislation	Community Services	Political	Administrative
General Fund								
Districts	$1,724,178.73	$3,651,778.79	$3,429,286.22	$ 679,191.28	$212,002.56	$322,367.89	$177,547.05	$
W.E. Installation	33,970.03	56,616.71	135,880.10					
W.E. Sales	27,744.61	46,241.02	110,978.45					
Long Lines	31,969.27	53,282.11	127,877.06					
Departments								
Negotiation	136,918.09							
Education	5,154.14	1,906.18	22,171.34	4,344.81	2,981.74	9,344.55	7,342.52	
Legislation					81,056.45			
Administrative							69,483.01	652,096.72
Finance and office operations			1,207,225.89					2,579,470.24
Community Services						33,763.11		
Development and Research	252,093.05							
Other headquarters								416,737.44
Beirne Memorial Foundation						100,000.00		
Contributions						2,770.00		
Legal	55,015.58	1,414,805.33	30,706.34	44,318.30				159,784.75
Convention and related committees								366,908.89
Executive Board								158,304.61
Other committees and conferences	66,722.51		2,396.91				2,531.86	34,688.06
CWA News and Newsletter	82,642.16	7,883.14	3,325.11	24,471.35	78,457.75	46,215.35	11,806.02	118,807.45
Pension Fund	577,952.64	636,053.70	634,663.73	149,561.58	56,155.09	63,104.98	46,425.25	616,038.03
Insurance, hospitalization and bonds	238,565.41	262,548.18	261,974.43	61,735.54	23,179.52	26,048.27	19,163.26	454,241.35
Taxes	127,375.99	140,180.98	139,874.64	32,962.14	12,376.12	13,907.82	10,231.74	187,978.12
Contingency								90,362.24
Equipment additions								188,857.22
Collective Bargaining Policy Committee	9,896.93							
Building operations								914,548.02
Publicity and public relations	201,597.11							
Foreign affairs	215,503.74							
Education	19,414.78	7,187.83	83,496.35	16,355.81	11,238.46	35,196.82	27,650.29	
Professional fees	141,302.62							
Staff moves	22,955.82	25,263.55	25,208.34	5,940.47	2,230.44	2,506.48	1,843.97	24,468.54
Contract reports and ratification	6,373.26							
Staff - illness absence	10,920.49	12,018.31	11,992.05	2,825.98	1,061.06	1,192.38	877.21	11,640.12
Affiliate member expense - LPN				14,986.28				
Affiliation dues								1,089,584.74
Defense Fund	1,324,481.63							
Organizing Fund				195,777.97				
Citizenship Fund						53,156.96		
District Organizing Allocation Fund				80,636.51				
Contract Report and Ratification Fund	441,658.66							
	5,754,414.25	6,315,765.83	6,227,056.96	1,313,108.02	480,739.19	709,574.61	374,902.18	8,064,516.54
Administrative	2,191,129.14	2,405,645.28	2,371,774.32	500,000.03	183,064.53	270,161.30	142,741.94	(8,064,516.54)
$29,240,077.58	$7,945,543.39	$8,721,411.11	$8,598,831.28	$1,813,108.05	$663,803.72	$979,735.91	$517,644.12	
	27.17%	29.83%	29.41%	6.20%	2.27%	3.35%	1.77%	

APPENDIX B

A portion of the Answers of the CWA Defendants to the Plaintiffs' First Amended Interrogatories dealing with Categories of Activities of CWA:

1. Handling and processing of grievances up to arbitration for members of the bargaining unit.

2. Participation in investigation, authorization and trial and processing of arbitration cases for members of the bargaining unit.

3. Administration of the collective bargaining agreement in effect at any given time.

4. Preparation for, research for and actual negotiation of the collective bargaining agreement covering the terms and conditions of employment of members of the bargaining unit for a given period of time.

5. Organizing employees in bargaining units not yet represented by a labor organization to strengthen CWA and thereby enable it to represent the members of the bargaining unit more fully and ably.

6. Conducting union meetings and conventions to assure that CWA adequately and properly carries out its duties as the exclusive collective bargaining representative.

7. Support of and opposition to legislative measures and administrative regulations which affect the subjects of collective bargaining; e.g., hours, wages and other terms and conditions of employment.

8. Strike and picketing activity, including support, advice, research and strategy utilized to improve terms and conditions of employment and to protect employees against employer unfair labor practices.

9. Recreational and social activities such as Christmas parties and annual picnics open to union members and

agency fee payers alike which afford an opportunity to bargaining unit employees to meet informally with their elected and appointed representatives to exchange information of mutual benefit, make known their complaints and suggestions for improvement of the contract on its administration, and break down or avoid internal disagreements which might impede the union's bargaining power or weaken its position with the employer.

10. Retirement, health and hospitalization and other fringe benefits provided for CWA staff members who participate in, contribute to or support contract bargaining or administration.

11. Training of CWA staff people to assure up-to-date highly competent representation of the bargaining unit members, including the training of stewards and area representatives to participate in contract administration and grievance adjustment.

12. Publications necessary to the carrying out of CWA's duties as collective bargaining representative.

13. Political activities such as "get-out-the-vote" campaigns; nonpartisan election and political education and encouraging bargaining unit members to support candidates and policies positively affecting their wages, hours and conditions of work.

14. Prosecution of court actions beneficial to the bargaining unit and to enforce contractual and statutory rights guaranteed to all members of the bargaining unit.

15. Defense of court actions beneficial to the bargaining unit and to protect members of the bargaining unit from being wrongfully deprived of rights guaranteed to them by statute and by the collective bargaining agreement.

16. Activities directly related to the improvement of terms and conditions of employment of union members and agency fee payers alike, including seeking legal, eco-

nomic, technical and medical advice on a wide range of work oriented subjects.

17. Collecting, crediting, managing and expending members dues and agency fee payers' dues equivalents as provided in the collective bargaining agreement, the constitution of the union and the laws of the United States, and preparing and furnishing reports and responses to agencies legally empowered to oversee union activities and expenditures.

18. Monitoring, overseeing and advising District and Local officers and staff to ensure effective and correct administration of the contract, compliance with all applicable laws, rules and regulations, and receive complaints and suggestions for improvement of the contract and its administration.

19. Participation in community affairs on all levels to enhance the Union's reputation, recognition and acceptance while impacting upon the conditions of life for members and non-members alike, and affecting the Union's bargaining power through public empathy and understanding.

20. Administrative support of its voluntary C.O.P.E. Fund as permitted by applicable Federal and State election laws.

21. Per capita contributions to the AFL-CIO calculated and transmitted solely for union membership, but with the purpose of improving wages, hours and conditions of employment for all workers in bargaining units represented by AFL-CIO member unions.

APPENDIX C

List of Aggregate Expenditures in the Beans' Study in Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration Which the Special Master Has Held to be Permissable

Category in the Beans' Study	Amount
Negotiation	$ 137,000
Education	138,000
Finance and Office Operations	1,207,000
Development and Research	252,000
Legal	1,501,000
Other Committees and Conferences	67,000
CWA News and Newsletter	94,000
Collective Bargaining Policy Committee	10,000
Professional Fees	141,000
Contract Reports and Ratification	448,000
Defense Fund	429,000
Total	$4,424,000

APPENDIX D

List of Expenses in Column 8—Administrative, of the Beans' Study Which the Special Master Has Held to be Permissable

Category in the Beans' Study	Amount
Furniture and Office Operations	$2,579,000
Development and Research	416,000
Legal	160,000
Convention and Related Committees	367,000
Executive Board	158,000
Other Committees and Conferences	35,000
CWA News and Newsletter	119,000
Contingency	90,000
Equipment Additions	189,000
Building Operations	915,000
Professional Fees	24,000
Total	$5,052,000

APPENDIX E

Summary of Calculations of Percentages

I

Percentage of Allocation of Total of Permissable Items in Column 3—Administration, of Total of Permissable Items in the Aggregate of Permissable Items in Column 1—Collective Bargaining, Column 2—Grievances and Column 3—Contract Administration

Total expenditures for fiscal year	$29,240,000
Less total expenditures in Column 8	8,065,000
Net expenditures less Column 8	$21,175,000
Total of permissable expenditures in Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration	$4,424,000
Divided by $21,175,000.00	24%

II

Calculation of Total Permissable Expenditures for Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration

Total of permissable expenditures in Column 8—Administrative	$ 5,052,000
24% of $5,052,000	1,212,000
Add, $4,424,000, supra	4,424,000
Total of permissable expenditures from Columns 1, 2 and 3	$ 5,636,000

III

Calculation of Percentage of Permissable and Impermissable Expenditures

Total expenditures during the fiscal year	$29,240,000
Divided into $5,636,000, total permissable expenditures	19.24%
Rounded off to—percentage of permissable expenditures	19%
Percentage of impermissable expenditures	81%

APPENDIX F

LIST OF PLAINTIFFS WHO ARE ENTITLED TO REIMBURSEMENT BY CWA

Name of Plaintiff		Amount of Agency Dues Paid to 9-30-79 Unless Otherwise Noted
	Local 2100	
Doris Ambrose		$ 431.50
Jacquiline B. Randon		431.50
	Local 2101	
Rue Downey	(to 9-30-78)	234.00
Kathleen Hal	(to 9-1-77)	160.00
Clay Lutz	(to 9-30-78)	234.00
Roland Merkle	(to 9-30-78)	284.00
Doris Morrow	(to 9-30-77)	132.00
Frances Phillips		410.22
Lois Stallings		410.22
Harry Swartz, Jr.		415.52
	Local 2108	
John Hurley		562.54
Harriet Lipscholtz		558.90
Barbara McGoughey	(to 11-16-76)	110.00
Marion Northrop		558.90
	Local 2110	
Mary Anna Cox		359.03
Et' el Merryman		390.50
Vi an Reedy		358.00
Barbara Russell		404.03
	Total	$6,444.86